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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

LORNE J. ACQUIN,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF CONNECTICUT

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November 18, 1982

QUESTIONS PRESENTED

1. Does the decision of the Connecticut Supreme Court holding that the defendant was not "interrogated" when he was subjected to police-initiated questioning and strip searching immediately following his clearly articulated, thrice-repeated requests for counsel, conflict with the decisions of this Court in Edwards v. Arizona, 451 U.S. 477(1981) and Rhode Island v. Innis, 446 U.S. 291 (1980)?

2. Does the decision of the Connecticut Supreme Court holding that the defendant was not "seized" within the meaning of the Fourth Amendment when he was transported by State POlice thirty miles from his home and subjected to a four-hour, incommunicado questioning substantially conflict with the decisions of this Court in Dunaway v. New York, 442 U.S. 200 (1979); United States v. Mendenhall, 446 U.S. 544 (1980); and Reid v. Georgia, 448 U.S. 438 (1980)?

3. Does the decision of the Connecticut Supreme Court holding that the defendant's will to resist was not overborne by the conduct of the State Police who held the defendant for nineteen hours incommunicado, shifted him to four different police-dominated interrogation situations, and interrogated him in the presence of a state-employed psychiatrist conflict with the decisions of this Court in Culombe v. Connecticut, 367 U.S. 568 (1961); Estelle v. Smith, 451 U.S. 454 (1981); and Leyra v. Denno, 347 U.S. 556 (1954) and deny him rights guaranteed by the Fifth, Sixth and Fourteenth Amendments?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, Lorne J. Acquin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on July 27, 1982.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 187 Conn. 647 (1982) and appears in the Appendix hereto. The judgment of the Superior Court of the State of Connecticut, the trial court appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on July 27, 1982. A timely motion to reargue was denied on September 22, 1982 by that court, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the decision of the Connecticut Supreme Court holding that the defendant was not "interrogated" when he was subjected to police-initiated questioning and strip searching immediately following his clearly articulated, thrice repeated requests for counsel, conflict with the decisions of this Court in Edwards v. Arizona, 451 U.S. 477 (1981) and

Rhode Island v. Innis, 446 U.S. 291 (1980)?

2. Does the decision of the Connecticut Supreme Court holding that the defendant was not "seized" within the meaning of the Fourth Amendment when he was transported by Connecticut State Police thirty miles from his home and subjected to a four-hour incommunicado questioning substantially conflict with the decisions of this Court in Dunaway v. New York, 442 U.S. 200 (1979); United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980); and Reid v. Georgia, 448 U.S. 438 (1980)?

3. Does the decision of the Connecticut Supreme Court holding that the defendant's will to resist was not overborne by the conduct of the State Police who held the defendant for nineteen hours incommunicado, shifted him to four different police dominated interrogation situations, and interrogated him in the presence of a state-employed psychiatrist conflict with the decisions of this Court in Culombe v. Connecticut, 367 U.S. 568 (1961); Estelle v. Smith, 451 U.S. 454 (1981); and Leyra v. Denno, 347 U.S. 556

(1954) and deny him rights guaranteed to him by the Fifth, Sixth and Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES,

AMENDMENT IV

The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

AMENDMENT XIV

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

FACTS

On November 13, 1979 Lorne Acquin was found guilty of the largest mass murder in the history of Connecticut and was sentenced to a term of not less than 105 years, nor more than life in prison. (App. B)[1]

The events which led to this conviction began shortly after 4:00 A.M. on July 22, 1977, when firefighters in the town of Prospect, while battling a residentail blaze at the home of Frederick Beaudoin, found the bodies of Cheryl Beaudoin, her seven children and a neighbor child, Jennifer Santoro. All the victims had been beaten, some had been bound, and Cheryl Beaudoin had been beaten and stabbed. Some of the bodies were charred

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1 In the interest of brevity and the preliminary nature of this petition citations contained herein are largely to those documents contained in the Appendix. Every fact, however, is definitively established by the entire Record.

beyond recognition. A few hours later, without probable cause, the Connecticut State Police picked up the defendant, a 27-year-old roofer of American Indian descent, who was the foster brother of Frederick Beaudoin. After a nineteen-hour incommunicado interrogation, the defendant signed a confession. He was indicted for nine counts of murder and a jury found him guilty of all counts. (App. 2a, 3a)

Of the evidence adduced during the lengthy trial, virtually the only link between the defendant and the murders was the seven-page confession obtained by the Connecticut State Police.

Prior to trial, the defendant moved to suppress his statement on Fourth, Fifth and Sixth Amendment grounds claiming that he had been seized at 9:30 A.M. on the morning of the fire; that there had been no probable cause for his seizure; that his Miranda rights had been violated; that his request for counsel had been ignored; and that the oppressive and coercive conditions of his interrogation produced an involuntary confession. (App. E)

At a pretrial hearing to suppress the confession and its fruits, it was established that at 6:58 A.M. on the morning of the fire, Detective Blais of the Connecticut State Police was ordered to search for Mr. Acquin who was considered a suspect. After two hours spent determining Mr. Acquin's whereabouts, Blais, State Trooper Hamila, and Detective Sergeant Messina, carrying service revolvers and a mug shot of the defendant, began a door-to-door search on the street where he lived. At 9:30 A.M., having located Acquin's house, an officer went behind the house, and another went to the front door. Acquin came to the door partially dressed. He was told only about a fire at the Beaudoin house, and was asked to go with the officers to the Prospect Town Hall, a few miles away, presumably to help in the investigation. While Acquin was dressing, Blais watched him "very, very closely"; as Acquin approached the police cruiser, Messina searched him and confiscated a double-edged razor-type roofing knife from his belt. No Miranda warnings were administered, but as soon as the defendant entered the car questioning began.

After dropping Messina at Waterbury Police headquarters, the troopers proceeded with the defendant in the rear seat of the police cruiser toward the Prospect Town Hall which was serving as the Command Post of the investigation. En route, the troopers, radioed that they had "located the subject". They were instructed by Lt. Shay, who was in charge of the investigation, to transport the defendant to the main State Police headquarters in Meriden, a distance of some thirty miles. (App. 4c; Tr. cites therein)

When the defendant questioned why they were going to Meriden, Trooper Blais told him: "That is where we were told to go." (App. 4c; 7/13/78 Tr. p. 63)

At the time of his order, Lt. Shay considered the defendant "a very serious subject in this case...a very, very important person" and ordered him transported to Meriden because "[we] like to have people talk to us on our turf...." in order to give [us] a psychological advantage, and because [people] are impressed with the official nature of the environment...away from the area that makes them comfortable...away from their friends and

family." (7/17/78 Tr. pp. 73-75)

The secretly taped conversations of the initial questioning at the Meriden State Police complex reveal that at 10:35 A.M. Blais read a standard Miranda warnings card to the defendant. Met with the defendant's staunch refusal to sign the warnings card, Blais repeatedly urged him to sign by false assurances that his statements would not be taken into court or repeated to anyone. (App. G; App. 7a, n. 3) Similarly, Blais reassured the defendant that he was not under arrest, but the defendant said, "It sounds to me like I'm being arrested." Blais insisted that Acquin was only being interviewed. (App. G)

The police continued to question the defendant about some scratches on his face and his activities during the previous night and early morning hours. Miranda warnings were again read to the defendant; he again refused to sign the card; and, once again, an officer contradicted the warnings as he urged the defendant to sign. The police had prepared a typed statement detailing the defendant's comings and goings the previous evening. The defend-

ant, who was barely literate, refused to sign the statement, asked that the part about its being used against him be obliterated, and refused to take a polygraph test. Blais viewed Acquin's continued refusals to sign as "resistance-type things." (7/13/78 Tr. p. 89)

In his taped and transcribed statement the defendant admitted to the police that he had gone berry picking with several of the Beaudoin children at around dusk on the evening of the fire; he explained several marks on his face and arms as the results of being assaulted and robbed in Waterbury much later that night. (App. 7a-8a)

Finally, Detective Zdanowicz, after four hours of questioning, told the defendant about the suspected homicides at the Beaudoin house; the defendant became emotional, began to cry, and asked to be taken home. (7/6/78 Tr. pp. 57, 116; 7/13/78 Tr. p. 99)

Zdanowicz, having telephoned all of this information to Shay at the Command Post, was directed not to release Acquin, but to bring him to the State Police Barracks in Bethany. Zdanowicz and Hamila

told Acquin they would take him home, but instead drove to the Command Post in Prospect. (7/6/78 Tr. pp. 58-59, 117, 122; 7/17/78 Tr. pp. 14-15, 99) At shortly before 2:00 P.M. Zdanowicz reported to Shay that Hamila was driving the defendant to Waterbury. Shay immediately radioed to Hamila ordering him to bring Acquin back. Hearing this, the defendant said he did not want to go; Shay again ordered Hamila to bring Acquin to the Bethany Barracks. The defendant again refused to go, but Hamila turned the cruiser back toward Bethany. (7/11/78 Tr. pp. 99-100)

At this point the defendant opened the car door; Hamila received a third order to bring Acquin in; Acquin got out of the car, but Hamila reassured him he would take him home; Acquin got back in the car, but Hamila began driving toward the Command Post; Acquin again got out of the car and started walking toward Waterbury. (Id., pp. 101-02; 7/6/78 Tr. pp. 61, 130-31)

Hamila radioed in and began following Acquin in his police car. Shay and four other officers in two police cars immediately drove to the scene. Shay walked briskly across the road to Acquin, put his arm around his shoulders and asked

him if he wanted to help in the investigation. Shay described the defendant as "glassy eyed, staring and non-communicative." (App. 11a)

For the next four hours Acquin was interrogated in an unventilated basement storage room at the Command Post. At the beginning of the second interrogation phase, Acquin again asked if he was under arrest. He was told that he was not under arrest, and Hamila again promised to take him home if he gave another statement. (7/11/78 Tr. p. 108-12, 116; 7/13/78 Tr. p. 116)

Finally at 5:45 P.M. Acquin stopped in the middle of Hamila's interrogation and said, unequivocally, "I think I'm in trouble. I better get a lawyer." Hamila asked: "Do you want a lawyer?" Acquin again unequivocally said, "I think I better get a lawyer. I think I got trouble." (App. 19a, n. 6)

At 6:00 P.M., Acquin's parole officer, Richard Kociszewski, arrived at the Command Post for the express purpose of seeing Acquin. Although Acquin had just invoked his right to counsel, Shay refused to allow Kociszewski to see Acquin, be-

cause Shay did not want to "interrupt the interview." Shay knew that Acquin was entitled to have a lawyer with him during questioning, but preferred that Acquin not have a lawyer, because in Shay's experience once an attorney "is present, the interview is generally over." (7/18/78 Tr. pp. 22, 30)

Similarly, during the time Acquin was being held, several friends, relatives, Acquin's employer, and a Department of Correction counselor tried to talk to Acquin and inquired whether he needed a lawyer. No one was allowed access to Acquin, and each was told the defendant did not want or need a lawyer. Hamila reported to State Police Captain McDonnell that Acquin wanted a lawyer. McDonnell sent Hamila out of the Command Post and continued his investigative plan. (Ex. 17, p. 3)

For one hour, from 6:00 to 7:00 P.M. following Acquin's invocation of the right to counsel, State Police Captain McDonnell continued to question Acquin alone in the storage room. For a third time Acquin said he wanted a lawyer. McDonnell asked the defendant to name an attorney, but the

defendant was unable to come up with the name of an attorney, and added that he didn't want the attorney that the police would call, because it would be just like talking to another cop. McDonnell pressed Acquin to name a lawyer. Finally, according to McDonnell, Acquin said that he would like to see Dr. Joel Albert, "a shrink or head doctor, but [Acquin did] not know if he was an attorney." McDonnell continued to question Acquin about some marks on his body and ordered Acquin to remove his pants, so that McDonnell could examine his legs. (7/18/78 Tr. pp. 63, 73-76, 101)

Some time after 7:00 P.M. Shay and McDonnell assigned a trooper to locate Dr. Albert. McDonnell told Hamila that they were going to get something to eat. Hamila and McDonnell drove the defendant past the remains of the Beaudoin house. At 7:30 they had a light supper in the cruiser; by 9:00 P.M. they had arrived at Troop I State Police Barracks, Bethany, where Acquin was again read Miranda rights.

At this point, the defendant had been in the company of police officers for almost twelve hours and had been transported to five different locations in five

different towns. Family and friends were still inquiring as to his whereabouts, his situation, and whether or not he needed a lawyer. All were put off by the State Police.

Joel Albert, who was employed by the Connecticut Department of Correction as a jail psychiatrist, remembered that he had treated Lorne Acquin and prescribed medication for him at the Bridgeport jail at least from December, 1975 until September, 1976. (Ex. 7, 8, 10)

Albert was brought to the Bethany Barracks in a State Police cruiser at 11:40 P.M. Albert testified that he had worked to maintain his "powerful" image among the inmates, and in that connection had sometimes obtained lawyers for them. (7/12/78 Tr. pp. 111-12)

McDonnell told Albert that Acquin wanted the psychiatrist's "presence before he was willing to make a statement to the police" and that Acquin "had not in any way incriminated himself." McDonnell made it clear to Albert that Albert would not in any way be permitted to assist the defendant; McDonnell said that "Acquin wanted to see [Albert], that McDonnell thought

Acquin had things to talk about and that all McDonnell wanted was for Albert to be present..." (7/14/78 Tr. p. 56)

Albert was never told that Acquin had asked for an attorney; he testified that had he known this, he would have told Acquin "'Lorne, keep your mouth shut. Let's get an attorney.'" (7/14/78 Tr. pp. 58, 59)[2]

The defendant claimed that he asked Albert to get him an attorney, and Albert replied "I don't think I can do that." (9/5/79 P.M., Tr. pp. 25-31, 38-39)

McDonnell and Albert entered the interrogation room and found Acquin sleeping in a chair. McDonnell left the room; Albert put his arm around Acquin's shoulders; expressed as best he could a feeling of warmth and asked Acquin if he wanted Albert there. The defendant replied that he did. Albert called McDonnell back into the room; Albert and Acquin sat on one side of the table and McDonnell sat across

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2 The testimony of the defendant, McDonnell and Albert disagreed regarding this and the facts which follow.

from them. McDonnell said, "Tell the doctor what happened last night." (Ex. 17, p. 20) The defendant objected: "No, I don't want to tell you." (7/18/78 Tr. pp. 85-86, 104-05) At this point McDonnell began questioning Acquin and an oral confession began. Albert thought as he listened that Acquin was a suicide risk and he was "on watch" for a possible breakdown requiring immediate commitment to a psychiatric institution. (7/7/78 Tr. pp. 31-33, Ex. 5, pp. 13-14)

Following the oral confession, Trooper Hamila went back into the interrogation room, read the defendant his Miranda rights, but the defendant again refused to sign the card. Hamila, in the presence of Dr. Albert, then interrogated the defendant for four more hours. While the confession was being typed up, Acquin and Albert were alone; Albert continued to reassure Acquin.

At 5:10 A.M. after having been in police company, incommunicado, for nineteen hours; after having been questioned in four different police-dominated locations, in four different towns, by five different State Policemen; after having

been searched and strip searched; and after having been interrogated in the presence of a State-supplied, State-employed psychiatrist, the defendant signed a seven-page, typewritten confession.

RULINGS BELOW

The lower court in denying the defendant's motion to suppress the confession, did not disagree with the undisputed facts recited above. The court, sitting as fact finder, assumed that the defendant had been taken into custody at 9:30 a.m. without probable cause. (App. F) Making its decision without benefit of this Court's decision in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979), the Court held that the long hours of interrogation and the repeated Miranda warnings had removed the taint of the illegal arrest. The lower Court, again without benefit of this Court's decision in Edwards v. Arizona, supra, also held that the defendant's request to see Dr. Albert and his subsequent confession constituted a waiver of his right to counsel; the Court further held, despite psychiatric evidence to the contrary, that the defend-

ant's confession was voluntary and that the conduct of the police officers did not overbear the defendant's will to resist.

In his appeal to the Supreme Court of Connecticut, the defendant argued that he was in custody from 9:30 a.m. and that this detention had been without probable cause. He further argued that he had three times invoked the right to counsel and that all interrogation should have ceased at that point, and he further argued that the circumstances of his interrogation and the introduction of a State-employed psychiatrist into the interrogation process had overborne his will and therefore rendered his confession involuntary.

The Supreme Court of Connecticut reached the questions tendered. That Court, disagreeing with the lower Court, held, on the Fourth Amendment question, that the defendant was not in custody until 2:00 p.m., because up until that time "any reasonable person would have felt free to leave," and that at 2:00 p.m. there was probable cause to arrest the defendant. On the Fifth and Sixth Amendment question the Supreme Court of Connecticut held that

questioning of the defendant after the invocation of the right to counsel was not "interrogation" within the meaning of Rhode Island v. Innis, supra. The Connecticut Court also upheld the lower Court's contention that the circumstances of the interrogation, including the presence of the State's psychiatrist, did not "overbear the defendant's will to resist." (App. 1a-54a)

REASONS FOR GRANTING THE WRIT

The Decision of the Supreme Court of the State of Connecticut is in Direct Conflict with this Court's Decisions in Edwards v. Arizona, 451 U.S. 477 (1981) and Rhode Island v. Innis, 446 U.S. 291 (1980).

Eighteen months ago, in Edwards v. Arizona, 451 U.S. 477 (1981) this Court held, under the Fifth and Fourteenth Amendments, that:

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, . . .

> having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 1884-85 (1981).

The case now before this Court, State v. Acquin, is not only on all fours with Edwards, but is more compelling than Edwards.

In Edwards and Acquin, both defendants invoked the right to counsel. Edwards said, "I want an attorney before making a deal"; Acquin, in the middle of interrogation, stopped and said, "I think I'm in trouble. I better get a lawyer." The trooper questioning Acquin asked if he wanted a lawyer. Acquin repeated, "I think I better get a lawyer. I think I got trouble.:

In Edwards, the interrogation ceased immediately upon invocation of the right to counsel and Edwards was taken to the jail. The next morning, at 9:15 a.m. two detectives came to the jail and began interrogating Edwards, despite his prior

request for counsel.

In Acquin, the initial request for counsel occurred at 5:45 p.m., after Acquin had been in the company of police officers since 9:30 a.m. and had been subjected to interrogation on and off for the vast bulk of that time. Prior to invoking the right to counsel, Acquin had been interrogated, for more than three hours, in the middle of July, in a 12' x 12' unventilated storage room. The trooper who had been interrogating Acquin reported the accused's invocation of the right to counsel, to his superior. His superior, Captain McDonnell entered the storage room at 6:00 p.m., a mere fifteen minutes after the invocation of counsel. According to McDonnell, he entered the room and told Acquin that the trooper "told me you want an attorney." Acquin said that he did want counsel.

McDonnell remained in the interrogation room for over an hour questioning the defendant. McDonnell admitted that during this period he ordered Acquin to remove his trousers so that McDonnell could examine some bruises on his legs. According to McDonnell he continued to question Acquin about which lawyer he wanted.

McDonnell cast upon the semi-literate defendant, who had been subjected to ten hours of interrogation, the burden of naming a particular attorney. Acquin was unable to come up with the name of a lawyer. According to McDonnell, Acquin again reiterated his request for counsel by indicating that he did not want any lawyer that the police would call, because it would be just like "talking to another cop." (Tr. 7/18/78 pp. 74-75) McDonnell continued to press Acquin to come up with the name of a lawyer; finally Acquin said that he wanted to see Dr. Albert, "a shrink or a head doctor," but Acquin was not sure if Albert was an attorney.[3]

Before Albert was brought to Bethany in a State police cruiser, McDonnell drove Acquin past the crime scene and changed the locus of the interrogation to yet

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3 McDonnell's claim that he was trying to find out who the defendant wanted for a lawyer is diluted by the clear, uncontraverted evidence that friends and family of Acquin were continually asking the police if he needed a lawyer. They were told he didn't need a lawyer, and no one, not even his parole officer was permitted to see him. See Culombe v. Connecticut, 367 U.S. 609, 637, 638, 639.

another police station.

It is clear that the State Police brought Dr. Albert to the Bethany Barracks for the very purpose of encouraging Acquin to make a statement, even though he had invoked his right to counsel at least four different times. As McDonnell testified, "He wanted to sit and have somebody sitting with us that he trusted before he had any further conversation." McDonnell also claimed that Acquin said he would "tell the truth" if Albert was there. Thus, it is obvious that bringing Albert to the State Police barracks was an action taken at the initiative of the police and calculated to encourage the defendant to incriminate himself. Obviously, this is an interrogation technique as defined in Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

The Connecticut Supreme Court reached the Edwards question as tendered by the defendant, but held in direct contravention of Edwards that the police-initiated questioning, following the invocation of counsel, was not interrogation, but merely an exploration of whether or not the defendant really wanted counsel.

The Supreme Court of Connecticut ignored the clear holding of this Court that such police contact is only permissible after the invocation of counsel, if the accused, himself, initiates the contact. There can be no doubt in this case that the police began to question Acquin again, a mere fifteen minutes after he had asked for counsel.

In short, the fact pattern and the legal problems raised in Edwards and Acquin are virtually identical; the main difference is that the police in Acquin acted more egregiously and more aggressively than the police in Edwards. The decisions in Edwards v. Arizona and State v. Acquin are diametrically opposed and cannot be reconciled. It is the mandate of this Court to eliminate such blatant conflicts in our constitutional law and in our criminal courts. The confession obtained in Edwards was suppressed because it was obtained in violation of the Fifth and Fourteenth Amendments. The Acquin confession must be suppressed for the same reasons.

The conflict between the State of Connecticut's highest court and this court

justifies the grant of certiorari to review the judgment below.

This Major Criminal Case Presents an Important Opportunity for this Court to Articulate Standards for Determining when a Fourth Amendment Seizure has Occurred, Thereby Reducing Conflict Among the State and Federal Appellate Courts.

In State v. Acquin, 187 Conn. 647 (1982) (App. A, pp. 11a-12a), while paying lip service to Dunaway v. New York, 442 U.S. 200 (1979), the Connecticut Supreme Court concluded that the defendant's initial, four-hour incommunicado questioning by State Police officers who had searched him and driven him more than thirty miles to State Police headquarters, was not a Fourth Amendment seizure, because "a reasonable person would have believed that he was free to leave, under all the circumstances surrounding the incident." United States v. Mendenhall, 446 U.S. 544 (1980).[4] In a case that is strikingly

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4 The Connecticut Supreme Court did not attempt to resolve the ambiguity created by the differing results in Mendenhall and Reid v. Georgia, infra, and does not at all mention Reid.

similar to Dunaway, procedurally and substantively, the Connecticut Supreme Court, like the New York appellate court in Dunaway, was in disagreement with the trial court which had, on the compelling facts before it, concluded that the defendant had been subject to a Fourth Amendment seizure. (App. F, pp. 6f-7f)

The decision of the Connecticut Supreme Court in this major criminal case, in fact, the largest mass murder in the history of Connecticut, graphically illustrates the profound confusion surrounding the question of when a Fourth Amendment "seizure" has occurred.

It had long been assumed that the test for determining if a "seizure" has occurred had been articulated in Terry v. Ohio, 392 U.S. 1, and its progeny. For almost fifteen years, it has been hornbook law that a person was seized for purposes of the Fourth Amendment "when the officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen", so that the citizen is not free to walk away. Terry v. Ohio, supra, at 19, n. 16. Obviously, the Terry test has not been clear enough to withstand

the rigorous scrutiny demanded by airport and border search cases. United States v. Mendenhall, supra; Reid v. Georgia, 448 U.S. 371 (1980); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). In United States v. Mendenhall, supra, at 553-54, only Justice Rehnquist and Justice Stewart were able to agree that a "seizure had occurred within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The reaction to the 3-3-2 split in Mendenhall has been much like the reaction to a technical knockout in a prizefight: very little is resolved. As the Fifth Circuit noted recently, "the Supreme Court has not yet articulated a definitive standard to determine precisely when a Fourth Amendment seizure has occurred." United States v. Setzer, 654 F.2d 354, 357 (5th Cir. 1981).

The split decision in Mendenhall has left the state and federal appellate courts in disarray. The reactions among the United States Courts of Appeals have largely been to fashion their own patch-

work tests, drawing from their own post-Terry case law: the Sixth and Seventh Circuits seem to have, reluctantly adopted Justice Stewart's Mendenhall test[5]; the Fifth and Ninth Circuits seem to have fashioned their own more subjective tests[6]; and the First, Second, Fourth and D.C. Circuits have extrapolated variants of an objective test.[7]

5 United States v. Jefferson, 650 F.2d 854, 856, n. 1 (6th Cir. 1981); United States v. Nembhard, 676 F.2d 193, 201, n. 7 (6th Cir. 1982); United States v. Black, 675 F.2d 129, 134 (7th Cir. 1982).

6 United States v. Morin, 665 F.2d 765 (5th Cir. 1982); United States v. Patino, 649 F.2d 724, 728-29, n. 4 (9th Cir. 1981).

7 United States v. Viegas, 639 F.2d 42, 44 (1st Cir. 1981), but see also Borodine v. Douzanis, 592 F.2d 1202, 1207 (1st Cir. 1979); United States v. Place, 660 F.2d 44, 50 (2d Cir. 1981), cert. denied, U.S. , 102 S.Ct. 2905 (1982); United States v. Marin, 669 F.2d 73 (2d Cir. 1982); Moore v. Ballone, 658 F.2d 218, 227 (4th Cir. 1981); Sharpe v. United States, 660 F.2d 967 (4th Cir. 1981); Gomez, et al v. Turner, 672 F.2d 134, 141 (D.C.Cir. 1982).

The situation in Connecticut is as unsettled as it is in the federal courts. Indeed, the Connecticut Supreme Court has demonstrated its own substantial confusion on the question of Fourth Amendment seizures by reaching wholly inconsistent results in State v. Ostroski, 186 Conn. 287, 440 A.2d 984 (1982) and in the case at bar.

Although this Court has granted certiorari in yet another airport search case, Florida v. Royer, No. 80-2146, argued 10/12/82, it is clear, from exerpts at oral argument, 32 Cr.L. 4067 (1982) that this Court is very much concerned with promulgating a workable test which will provide a framework for other appellate courts to determine when a Fourth Amendment seizure has occurred.

It is respectfully submitted, however, that the airport/border search situation is not the most durable crucible for fashioning such a test. The problem is that airport search cases may belong to a special narrow category of cases that resemble Terry stops. As the Fifth Circuit has suggested, there may be three distinct types of police/citizen en-

counters: "(1) full scale arrests; (2) restraints of citizens which are less than arrests but which nevertheless trigger Fourth Amendment scrutiny; and (3) personal intercourse between police and citizens which may be for investigative purposes but which are not restraints on the citizen's liberty and which thus are not encompassed by the Fourth Amendment." United States v. Setzer, supra, at 357.

The case at hand clearly illustrates the obfuscation that has resulted from viewing airport detentions as a microcosm of the much larger Fourth Amendment picture. Obviously, the initial encounter between Acquin and the police as carefully detailed at pp. 7-12, infra, cannot be characterized, by any stretch of the judicial imagination, as "personal intercourse between police and citizens which may be for investigative purposes, but which are not restraints on the citizen's liberty." This type of custodial questioning bears absolutely no relation to the street encounters permitted in Terry or the airport detention described in Mendenhall or the seizure condemned in Reid. The drafters of the Fourth Amendment could never have

contemplated the difficulties of balancing police and citizen interests inherent in the complicated twentieth century settings of airports and high crime areas, but the framers were certainly familiar with the spectre of citizens being "picked up" or "hauled in" for long and rigorous "investigations." Moore v. Ballone, supra, at 225; see Boyd v. United States, 116 U.S. 616, 630 (1886).

When suppression of a confession resulting from seizures based on less than probable cause as mandated by Dunaway v. New York, supra and Taylor v. Alabama, U.S. , 102 S.Ct. 2664 (1982) turns, as in the case at bar, on the question of seizure, then the need for a clear "seizure" standard becomes painfully apparent. As Justice Stevens makes clear in Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2593, n. 15, one of the main reasons that Terry-type minimal intrusion stops are permissible on less than probable cause, is precisely because they are not likely to have the coercive aspects of a custodial interrogation that are designed to induce self-incriminatory statements. Whatever rules this Court may evolve for the spe-

cial circumstances for on-the-street encounters in high crime areas or for the unique circumstances engendered by airport stops, this Court should not lose the opportunity to make crystal clear that seizures for interrogation purposes are subject to the full rigors of Fourth Amendment scrutiny.

This unresolved question of Fourth Amendment seizure is a vital issue that justifies a grant of certiorari to review the judgment below.

The Connecticut Supreme Court's Approval of the Coercive Interrogation Techniques of the Connecticut State Police is Substantially in Conflict with the Great Body of Law Promulgated by this Court Condemning Police Interrogation Practices Designed to Destroy the Defendant's Will to Resist.

In approving the admission of the defendant's confession, the Connecticut Supreme Court concluded that there "is simply no evidence that the circumstances [leading up to the confession] were such as to overbear [Acquin's] will to resist . . . ." (App. A, p. 49a) This holding, in light not only of the facts of this case, but also in light of the

forty-five year history of this Court's decisions condemning offensive police practices,[8] flies in the face of any concept of due process of law or voluntariness as we have come to understand it. More than twenty years ago, in reversing another egregious Connecticut State Police interrogation case, Justice Frankfurter wrote for this Court:

> What actually happens to them [the accused] behind the closed door of the interrogation room is difficult if not impossible to ascertain . . . [If] a person is abused, he is faced with the task of overcoming, by his lone testimony, solemn official demands. The person knows this -- knows that no friendly or disinterested witness is present -- and the knowledge may itself induce fear. But, in

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8 Brown v. Mississippi, 297 U.S. 278 (1936); Rogers v. Richmond, 365 U.S. 534 (1961); Townsend v. Sain, 372 U.S. 293 (1963); Lee v. Mississippi, 332 U.S. 742 (1948); Payne v. Arkansas, 356 U.S. 560 (1958); Turner v. Pennsylvania, 338 U.S. 62 (1949); Davis v. North Carolina, 384 U.S. 737 (1966); Fay v. Noia, 372 U.S. 391 (1963); Spano v. New York, 360 U.S. 315 (1959); Jackson v. Denno, 378 U.S. 368 (1964).

> any case, the risk is great that the police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt.

Culombe v. Connecticut, 367 U.S. 568, 573-75 (1961).

There can be no doubt that the Connecticut State Police had but one purpose in detaining Lorne Acquin on July 22, 1977; that purpose was to obtain admissions and, if possible, a confession, "despite his constituted right not to do so," Escobedo v. Illinois, 378 U.S. 478, 485 (1964).

The facts, as minutely detailed in pp. 12-17, infra, have every earmark of a coerced confession:

the defendant was held, initially without probable cause, for almost twenty hours; he was in the company of three or more State troopers at all times; he was taken more than thirty miles from his home and questioned in at least four different police-dominated locations; he was held incommunicado and all attempts by friends, relatives, his counselor and his parole officer to see him were rebuffed by

the State Police; for at least three hours of the interrogation, he was questioned in the middle of a July afternoon in an unventilated 12' x 12' storage room; his requests for counsel were subverted; he was strip-searched and driven past the crime scene after he invoked the right to counsel over and over again; and a State-employed psychiatrist was brought to the interrogation site for the express purpose of helping police extract a confession.

Arthur Culombe had been the object of the over-zealous interrogation techniques of the Connecticut State Police; Lorne Acquin, learned twenty years later, that those techniques have not changed significantly. As Justice Douglas wrote in Culombe,

> "the system of police interrogation under secret detention falls heaviest on the weak and illiterate. . . . [t]he member of a minority group without status or power is the one who suffers most when we leave the constitutional right to counsel to the discretion of the police. 367 U.S. at 640-41.

This Court has recently held in Estelle v. Smith, 451 U.S. 454 (1981)

that Culombe v. Connecticut's proscription against police making an accused the "deluded instrument of his own conviction" limits the use of statements obtained by psychiatrists in examining criminal defendants. This holding is perfectly consistent with the substantive due process holding of Leyra v. Denno, 347 U.S. 556 (1954). The ability of the police to obtain confessions or incriminating statements through the use of psychiatric intervention is clearly a practice designed to overbear the will of the accused[9] and should be strictly circumscribed by this Court.

The purpose and flagrancy of the official misconduct in this case, cries out for condemnation by this Court. Brown v. Illinois, 422 U.S. 590, 604 (1975). The important question of whether or not police may use psychiatric intervention as an interrogation tool justifies a grant of certiorari in this case.

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9 Expert psychiatric testimony supporting the defendant's claim that his will was overborne was presented by Thomas Szasz, M.D. and Richard Loewenstein, M.D. (App. F)

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,

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DATED: November 18, 1982

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

LORNE J. ACQUIN,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE

STATE OF CONNECTICUT

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APPENDIX

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APPENDIX A

SUPREME COURT

October Term, 1981

STATE OF CONNECTICUT v. LORNE J. ACQUIN

SPEZIALE, C.J., PETERS, HEALEY, ARMENTANO and SHEA, Js.

Argued June 3, 1982-decision released July 27, 1982

Indictment charging the defendant with nine counts of murder, and information charging the defendant with arson in the first degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before Pickett, J.; verdict and judgment of guilty and appeal by the defendant to this court. No error.

John R. Williams, special public defender, for the appellant (defendant).

Francis M. McDonald, state's attorney, with whom were Paul E. Murray, assistant state's attorney, Catherine J. Capuano, special assistant state's attorney, and, on the brief, Walter H. Scanlon, chief assistant state's attorney, for the appellee (state).

SPEZIALE, C.J. In the early morning hours of July 22, 1977, police and fire officials found nine bodies, eight of them children, inside the burned-out house of Fred Beaudoin, Sr. and Cheryl Beaudoin in Prospect. All of the victims had been beaten, some had been bound, and Cheryl Beaudoin had been stabbed. The defendant, Lorne Acquin, was indicted for the murders, and charged by information with first degree arson for the burning of the house. After a trial before a jury of twelve, he was found guilty on all counts and sentenced to an effective prison term of not less than 105 years nor more than life.

Before and during trial, the defendant made a number of motions challenging the admissibility of a confession which was obtained from him while he was in police custody on July 22. He also sought to suppress items of physical evidence which he claimed were the fruits of his illegally obtained confession. These motions were denied.[1]

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1 The court, however, did suppress evidence of the defendant's blood type obtained from a urine sample.

The defendant has appealed to this court, claiming error in (1) the admission of his confession and its fruits at trial, (2) the exclusion of a written hearsay statement, and (3) the composition of the jury array.

I

THE CONFESSION

The defendant made a confession to the state police in which he described in graphic detail his brutal and apparently motiveless murders of the nine victims. The confession was admitted at trial over defendant's objection. The defendant claims, inter alia, that the confession was obtained in violation of his fourth amendment right to be free from unreasonable seizures and his fifth amendment right not to be a witness against himself, as those rights are applied to the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

A

THE FOURTH AMENDMENT CLAIM

A confession is by definition a self-incriminating statement, and any challenge to the admissibility of a confession naturally focuses on the fifth amendment guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const., amend. V. The now familiar warnings required by Miranda v. Arizona, 384 U.S. 436, 467-73, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), are designed primarily to protect that right. Before the fifth amendment issue is reached, however, a preliminary inquiry involving the fourth amendment must be made.

Miranda held that "the prosecution may not use statements...stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id., 444. It is clear in the Miranda opinion itself, and also in cases decided by this court, that "[b]efore one suspected of the commission of a crime is entitled

to the warnings constitutionally required by Miranda ... two conditions must be satisfied: the suspect must be in the custody of law enforcement officials; Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); Beckwith v. United States, 425 U.S. 341, 344-48, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976); and the suspect must be subjected to interrogation. Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) ...." State v. Stankowski, Conn. (42 Conn. L.J., No. 46, pp. 5, 10), cert. denied, U.S. , 102 S.Ct. 596, 70 L.Ed.2d 588 (1981); see Miranda v. Arizona, supra, 444.

The first prong above is derived from the fourth amendment guarantee of freedom from unreasonable seizures. In this respect, we recently held that "[w]hether the confession and physical evidence are admissible turns on the answers to two subsidiary questions: (1) whether the defendant was 'seized' within the meaning of the fourth amendment to the United States constitution and article first, §7 of the Connecticut constitution

so as to invoke their protection, and, if so, (2) whether he was 'reasonably' seized, that is, whether there was probable cause to seize him. State v. Derrico, 181 Conn. 151, 157-58, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 789, 66 L.Ed.2d 607 (1980); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)."[2] State v. Ostroski, 186 Conn. 287, 290-91, 440 A.2d 984 (1982).

1

Custody

The defendant was in the company of police officers for all but a few minutes from 9:30 a.m. on July 22 through the time his confession began at approximately 11:45 p.m. Ostroski, supra, requires that the court determine when the defendant was

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2 It should be noted that where there is an illegal seizure it is also necessary that the acquisition of the evidence sought to be suppressed be casually related to the illegal seizure. State v. Derrico, 181 Conn. 151, 157-58, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S.Ct. 789, 66 L.Ed.2d 607 (1980).

legally in custody and whether, at that time, the police had probable cause to arrest him.

At about 9:30 a.m. on the morning of the Prospect fire, police went to Acquin's residence. Trooper James K. Blais told Acquin that the Beaudoin house had burned and some deaths had occurred there. Blais then "asked him if he would voluntarily help us by coming with us to help in the investigation." Acquin voluntarily agreed to go to the Bethany barracks, and then to the Meriden state police headquarters. He was read the Miranda rights for the first time at about 10:30 a.m., and officers began to question him about the Beaudoin family and about his own activities on the previous day.[3] The interview was tape recorded.

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3 Although the Miranda rights were read to the defendant he clearly understood them from his responses, the circumstances surrounding the reading of those rights are particularly unsettling. After Blais read from the card, the following conversation took place:

"Blais: Just want to put your initials on this please.

Acquin: What's all this,...?

Detective Joseph R. Zdanowicz relieved Blais at approximately 10:45 a.m. and also advised Acquin of the Miranda rights. Zdanowicz then continued the

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Blais: Its [sic] just acknowledging that I read those rights to you.
Acquin: ...court.
Blais: No, no, no, no. I'm not taking this into court. It doesn't say that, I didn't say that to you.
Acquin: (Inaudible).
Blais: No, ... See we have to tell this. We don't know what you're gonna tell us. See we have to tell, we have to advise you of your Constitutional Rights.
Acquin: (Inaudible).
Blais: Because of the importance..., no.
Acquin: (Inaudible).
Blais: Because we're interviewing you. We're just interviewing you. See I won't be talking to anybody ... advise you of your rights.
Acquin: (Inaudible).
Blais: You've never been advised of your rights before?
Acquin: (Inaudible). ... arrested.
Blais: You're not arrested."

It is significant that the conversational pattern was repeated later after Detective Joseph R. Zdanowicz read the Miranda-based preamble to the defendant's written statement:

"Zdanowicz: Now this is strictly on your own volition.
Acquin: (Inaudible).
Zdanowicz: Alright? Want to read this all over again?

questioning and prepared a written statement, which Acquin refused to sign. Shortly thereafter, at about 1:30 p.m., Acquin indicated that he did not want to

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Acquin: (Inaudible).
Zdanowicz: (Inaudible).
Acquin: (Inaudible).
Zdanowicz: They were read to you?
Acquin: (Inaudible).
Zdanowicz: And you don't want to sign it now do you?
Acquin: No because I don't ... what it says. I don't like what it says.
Zdanowicz: What does it say?
Acquin: It says, (inaudible).
Zdanowicz: No....well are you familiar with the system at all, the judicial system which you must be because you've been there so many times?
Acquin: (Inaudible).
Zdanowicz: You've been there when they've tried to arrange ....
Acquin: Yes, ...
Zdanowicz: Yeah well the courts also ...talk to people they always...have to read people their rights in a situation. That they could add information or be accused of or whatever the situation may be. So by law we are required to inform a subject of his rights and this is what we're doing. In other words for them, they say they sat here and chatted with you and they warned you of your rights and they gave you this blue card which has all your rights. If you wish to sign it you can but don't if you don't have to. And they do prepare you of your rights because they have to by law. (Inaudible). I'm

hear about the details of the crime, and asked to go home. Trooper George R. Hamila escorted Acquin to a police car, and they drove him home to Waterbury.

Upon learning that Acquin was being taken home, Lieutenant James Shay, the officer then in charge of the investigation, radioed an order to Hamila to bring Acquin to the Bethany barracks. Acquin told Hamila that he did not want to go back, and they continued toward Waterbury. When Shay repeated the order, Hamila turned the car around. Acquin protested and opened the door of the moving patrol car

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not giving any ... statement today, I want you to fully understand what the situation is.

Acquin: I understand."

The statement that a police interviewer "won't be talking to anybody" is in direct contradiction to the statement in Miranda that "anything said can and will be used against the individual in court." Miranda v. Arizona, 384 U.S. 436, 469, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1967). Because we hold below that the defendant was not in custody during the 9:30 a.m. interview, we need not decide what the legal effect of this elaboration on Miranda may be, but we cannot condone any attempt by officers to explain away the import of the fundamental constitutional rights contained in the Miranda warnings.

to get out. Hamila stopped the car, and Acquin began walking north on Route 69 toward home. Within minutes, at approximately 2 p.m., Shay arrived on the scene, accompanied by four other officers in two police cars. Shay placed a hand on Acquin's shoulder and spoke to him briefly. Surrounded by three cars and several officers, Acquin agreed to return to the Prospect command post with Shay.

At oral argument before this court, the state conceded that the defendant was seized for fourth amendment purposes when Shay placed a hand on him on Route 69. We agree.

This court has recently affirmed that a person has been "seized" so as to invoke the protection of the fourth amendment "'only when by means of physical force or a show of authority, his freedom of movement is restrained. . . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification. . . . We conclude that a person has

been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' United States v. Mendenhall, 446 U.S. 544, 553-54, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)." State v. Ostroski, supra, 291-92; see also Miranda v. Arizona, supra, 444. In this case Acquin had just been questioned for three hours by the police, he had heard an order to return him to the police barracks, he was surrounded by police officers, and the senior officer had placed a hand on his shoulder. Although Shay did not declare "I seize you in the name of the State," his classic gesture could not have been more clear. No reasonable person could have believed that he or she was free to leave. The defendant was in custody at that time. State v. Ostroski, supra; United States v. Mendenhall, supra.

The defendant contends, however, that he was in custody at approximately 9:30 a.m. when he was first questioned. The record reveals the following undisputed facts: The defendant voluntarily

agreed to accompany the officers, first to Bethany, then to Meriden. The questions asked of him concerned the Beaudoin family, whom he knew well, and his contact with them the previous day. When he asked to go home, all questioning stopped, he was promptly taken to a police car, and the police started to drive him home. No claim is made that he was restrained or coerced in any way during the initial interview. Under the undisputed facts before us, no reasonable person could have considered that he was not free to leave at that time. The defendant was not in custody until he was seized by Shay at approximately 2 p.m.

2

Probable Cause

"'Probable cause exists when the facts and circumstances within the knowledge of the officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that a felony had been committed.' State v. Wilson, 153 Conn. 39, 42, 212 A.2d 75 [1965]"; State v. Wilson, 178 Conn. 427,

435-36, 423 A.2d 72 (1979); and that the person arrested committed it. State v. DeChamplain, 179 Conn. 522, 529, 427 A.2d 1338 (1980); see Brinegar v. United States, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction. Our cases have made clear that "[t]here is often a fine line between mere suspicion and probable cause, and '[t]hat line necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances.' Brinegar v. United States, supra, 176." State v. Penland, 174 Conn. 153, 155-56, 384 A.2d 356, cert. denied, 436 U.S. 906, 98 S.Ct. 2237, 56 L.Ed.2d 404 (1978). Furthermore, when we test the quantum of probable cause, it is not the personal knowledge of the arresting officer but the collective knowledge of the law enforcement organization at the time of the arrest which must be considered. State v.

Runkles, 174 Conn. 405, 411, 389 A.2d 730, cert. denied, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 168 (1978); State v. Romano, 165 Conn. 239, 246, 332 A.2d 64 (1973); State v. Cobuzzi, 161 Conn. 371, 377, 288 A.2d 439 (1971), cert. denied, 404 U.S. 1017, 92 S.Ct. 677, 30 L.Ed.2d 664 (1972).

It is uncontested that the following facts were known to the police before Shay approached the defendant on Route 69 at about 2 p.m.: Nine bodies had been found, all badly beaten and some tied up, in the burned-out Beaudoin house. The fire was the result of arson. Acquin was the foster brother of Fred Beaudoin, Sr. and a frequent visitor to the Beaudoin home. Acquin had been : the house from at least 7:30 to 10 p.m. on the previous evening, July 21. Acquin had recent scratches on his face, which he explained were the result of a mugging the night before. In Zdanowicz's opinion, the injuries were not consistent with this explanation. Acquin had not reported the mugging to the police, and had not mentioned it at all in his oral statement to the police at approximately 9:30 a.m.

Resident state troopers in Bethany considered Acquin to be violent by nature on the basis of past experience. Acquin had once lived at the Beaudoin house and the house had caught on fire during that period.

In addition, police had interviewed Fred Beaudoin, Sr. and Alden Brooks, the only living people other than Acquin known to have been at the house on the night of July 21-22. Beaudoin had been at work when the fire broke out at approximately 3:45 a.m., and Brooks had apparently offered an acceptable account of his own whereabouts. When Acquin was told of the fire and deaths at 9:30 a.m. he showed neither surprise nor emotion. Rose Ann Paolino, who reported the fire at 3:45 a.m., had seen a dark colored car speeding away at that time. Acquin often drove a black Rambler, and had been driving it earlier in the evening.[4] Finally,

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4 The defendant stresses the fact that Paolino stated that the taillights she saw were round, and that the taillights of the Rambler were rectangular. It is not clear from the record, however, whether this discrepancy was known to the

Fred Beaudoin, Jr., one of the child victims, had told a playmate that Acquin was going to sleep overnight at the Beaudoin home on the night of the murders.

The defendant's contention that the police had information which implicated others as possible suspects need not detain us. The function of this court is not to second-guess the reasonable and logical conclusions of experienced police officers at the time of their determination of probable cause. Nor are we concerned with a retrospective look at the truth or falsity of the information which police had at the time of the arrest. Brinegar v. United States, supra, 176.[5]

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police at 2 p.m. Furthermore, a probable cause determination involves an evaluation of the totality of evidence available, and often must disregard minor discrepancies in that evidence.

5 The Supreme Court in Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L.Ed. 1879 (1949), held: "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable [persons], acting on facts leading sensibly to their conclusions of probability. The rule of pro-

We hold that the defendant was in custody on Route 69 at 2 p.m., and that the custody was legal because there was probable cause to arrest him at that time.

B

THE FIFTH AMENDMENT CLAIM: MIRANDA

The defendant's graphic and detailed confession to the murders was admitted at trial. The defendant asserted before the trial court, and claims before this court, that the confession was obtained in violation of his right not to be compelled to be a witness against himself under the fifth amendment to the constitution, as interpreted in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, reh. denied, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981), and

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bable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests [of individual rights versus community protection]. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

Miranda v. Arizona, supra.

After his encounter with Shay on Route 69 in Prospect at approximately 2 p.m., Acquin was brought to the Prospect command post. He was again read the Miranda rights and then questioned at length by Hamila regarding his activities of the preceding two days. At approximately 5:45 p.m. Acquin interrupted himself in midsentence and stated that he wanted a lawyer.[6]

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6 Hamila testified on cross-examination:

"Q. Okay. While you were at the Prospect Town Hall you told us there came a time, around five-forty-five p.m., when Mr. Acquin asked for a lawyer. Would you relate in detail the circumstances surrounding that request?

A. [Trooper Hamila] I was taking a statement from him at the Town Hall. And, as we were talking Lorne just stopped in the middle of a sentence or whatever I had written there and he told me, he says: I think I'm in trouble, I think I better get a lawyer. And, I says: do you want a lawyer. He says: I think I better get a lawyer, I think I got trouble.

Q. And, then what?

A. I stopped right there. I went to the door, I opened the door and called for Captain McDonnell. And, Captain McDonnell came to the room. I says: I think Lorne wants a lawyer."

Hamila reported Acquin's request for counsel to Captain Thomas McDonnell of the Connecticut state police, who had assumed overall command of the investigation. McDonnell told Hamila to get something to eat. McDonnell then went into the room with Acquin and talked with him for over half an hour in an attempt to discover who Acquin wanted to represent him. McDonnell suggested Acquin's previous attorney and the public defender. Acquin rejected both, as he did the suggestion that his brother be called to get him an attorney. After some time, Acquin indicated that "it wasn't really an attorney that he wanted, it was just somebody he could trust," and that he wanted Joel Albert, a psychiatrist working with prisoners in the New Haven jail. Acquin also indicated "that as soon as Albert got there that he would tell us the truth about what happened the night before."[7] McDonnell broke off the conversation at that point, and ordered Shay to find and

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7 Because the conversation between McDonnell and Acquin is central to our holding, McDonnell's testimony on direct examination is set out at length below:

to summon Albert. He then returned to the interrogation room, and he and Acquin decided to get something to eat.

"Q. All right. Now, it was in the vicinity of six o'clock when you talked to Trooper Hamila regarding this lawyer; is that right?

A. That's right.

Q. And, he left. What did you do?

A. I went in the room with Lorne Acquin and shut the door. And, it was just he and I in the room at that time.

Q. When you entered the room was there anybody else there besides Acquin?

A. No.

Q. What, if anything, did you say to Acquin?

A. I told him that: Trooper Hamila told me that you want an attorney.

Q. What did he say?

A. He said: yes, he did.

Q. And, then what did you say?

A. I asked him who he wanted. And, there were very long pauses before he would respond to my questions. And, then he said he didn't know; I asked him: did he have anyone in particular in mind. He said no. I asked him: how about the attorney that you had last time. And, he told me that he didn't trust that attorney and he didn't want him. I asked him -- told him that: was there anybody else, another attorney. He said no, there wasn't another attorney that he wanted or trusted. I asked -- Then I told him: if he couldn't pick an attorney that I would make calls and get a public defender or the state would provide an attorney for him. And, he replied to that that he

Hamila returned shortly thereafter, and McDonnell, Hamila and Acquin drove to a restaurant nearby, where they ate hamburgers in the police cruiser.

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didn't want the attorney that we -- that I would call. He said: it would be just like talking to another cop. He didn't want any attorney that we choose. I then asked him about his family. I told him: I was pretty sure that his brother was in the building someplace, although I hadn't seen his brother, could his brother get an attorney for him.

Q. What did he say?

A. He said no. He didn't want his brother to get involved. He didn't want his brother to even know he was in the building or he didn't want his brother to know that he was involved here in the building with us.

Q. Then what happened?

A. Then we continued to talk about how would we find him an attorney, how would we get an attorney for him. And, he said that he -- it wasn't really an attorney that he wanted, it was just somebody that he could trust. He wanted to sit and have somebody sitting with us that he trusted before he had any further conversation. And, I asked him who that, you know -- is there such a person, who can we get for you. And, he suggested a Dr. Albert, who I was not familiar with and didn't know who he was. And, I asked who he was and how he knew him. And, he told me that he knew him from the New Haven Jail and he thought he was employed at the New Haven jail.

Acquin was not handcuffed or physically restrained during this trip. At Acquin's request he was taken to Bethany rather than back to Prospect, where a crowd of reporters had gathered.

About that time I went out to Lieutenant Shay and I told Lieutenant Shay that he wanted a Dr. Albert and to get a hold of Dr. Albert and have him come to the command center where we were.

Q. Did you ask Acquin whether or not Dr. Albert was a lawyer?

A. Yes, I did. And, he said that he knew he was a -- I think he was referring to him by a slang expression. He was calling him either a shrink or a head doctor or something like that, but wasn't sure whether or not he was an attorney. And, I told him that, you know, that Dr. Albert couldn't play the part of an attorney if, in fact, he wasn't an attorney. And, Acquin just kept saying that he wasn't really concerned about that, what he wanted was somebody to sit in that he could trust and be with him.

Q. Did he say he trusted Dr. Albert?

A. He said he trusted a Dr. Albert very, very much. In fact, he said that, while this conversation was going on, that he had told me and Dr. Albert some things that we were the only two he had ever told, he hadn't even told some of his family members.

Q. And, how long did this conversation go on?

A. Well, from the time I went in the room until I came out and told Shay -- I would say from a half to three quarters of

In Bethany, Acquin was left alone in a room to wait for Albert. He curled up in an armchair and slept or rested for about two and one-half hours, when Albert finally arrived at approximately 11:40 p.m. on July 22. McDonnell woke Acquin up, and asked whether he still wanted to see Albert and to tell his story. Acquin said he did, and the two of them joined Albert in another room. McDonnell told Acquin that Albert was not an attorney and reminded him that any statement made could be used against him in court;[8] and at Albert's request, McDonnell then left

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an hour or so....

Q. After he said he wanted to see Dr. Albert, what happened?

A. Well, that is when I told Shay to make arrangements to find Dr. Albert. And, I did that as soon as Acquin said: that as soon as Dr. Albert got there that he would tell us the truth about what happened the night before."

8 McDonnell testified on direct examination:

"A. I first went down, told Lorne Acquin that Dr. Albert was here and did he still want to see him and that he still wanted to talk with us while Dr. Albert was present. And, he said: yes, he did. So, I went back to the room and got Dr. Albert. And, Dr. Albert came into the room. And, the three of us then sat in

the room. Albert determined that Acquin did want him there, and called McDonnell back in. Neither Acquin nor Albert mentioned an attorney.[9] On direct examina-

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the room.

Q. And, what happened then?

A. Again, I attempted to make it very clear to Lorne that Dr. Albert was not an attorney. I had already inquired of that fact, that Dr. Albert -- found out he was not an attorney and that he couldn't act in the capacity of an attorney. And, I told him that anything that he told Dr. Albert while I was seated there and listening and anything that I overheard, that I would be able to testify to against him and use any information obtained during that conversation against him in court."

9 Albert testified on direct examination at the suppression hearing about his encounter with Acquin in Meriden:

"Q. Could you describe Lorne Acquin when you first observed him this night, Doctor?

A. Mr. Acquin came in. He seemed to be waking up. He came over to me and greeted me and I greeted him. He seemed collected. He seemed to be glad to see me.

Q. What, if anything, did he say to you?

A. I believe we exchanged greetings. I think he said, 'Hi, Doc.' I said, "Hi, Lorne." Something of that nature.

Q. What, if anything, did he say?

A. What's that?

tion, McDonnell described the conversation which followed:

Q. Then what, if anything, did he say?

A. At one point or other I remember quite well he, in the presence of myself and Captain McDonnell, he said, 'Well, Doc, I really did it this time.' And I had no understanding of what that meant at that time.

Q. After this greeting and this comment, was there a period you were alone with Acquin?

A. Yes. I told the Captain that I wanted to see Mr. Acquin alone, and he left the room.

Q. He left the room?

A. Yes.

Q. And both of you were left in the room alone together?

A. That's correct.

Q. What was the conversation you had with him?

A. I asked Mr. Acquin whether he wanted me to be present, in fact, with him, and he said he did.

Q. Could you tell us, Doctor, if he said no, what would you have done?

A. I would have left.

Q. As he said yes --

A. I probably would have also asked him what was going on, things of that nature.

Q. But you would not have remained?

A. No, not at all.

Q. After this short conversation what happened?

A. Then I -- once I was assured Mr. Acquin did want me to be there as a witness, I called the Captain in.

"A. They [sic] then asked Lorne Acquin: do you want to tell us what happened last night. And, he said: no, I don't want to tell you.

Q. And, what did you say?

Q. What, if anything, did you say to the Captain?

A. I didn't say anything to the Captain.

Q. What happened next? Did anybody say anything?

A. At that point the Captain said something to the effect that 'Dr. Albert is here now and you said you wanted to say something else to us, or make a statement,' something of that nature, at which point Mr. Acquin went into a rather graphic confession of the killings.

Q. Do you recall how this began?

A. Spontaneously on Mr. Acquin's part.

Q. Do you recall the first thing he said in regards to --

A. As a matter of fact, I think that -- I'm quite sure but I'm not absolutely sure that Captain McDonnell reminded Mr. Acquin of his legal rights prior to Mr. Acquin making any -- you know, going into any statement or details of what had gone on that previous evening.

Q. Do you recall the words used by Captain McDonnell?

A. No, I can't recall that.

Q. Did he say he didn't have to say anything or words to that effect?

A. Yes.

Q. All right. Do you recall the first thing that Lorne Acquin said in regards

A. I said: well, I thought you said when Dr. Albert got here that you would tell us the truth about what happened last night. And, he said: well, what I mean is, it's--I don't want to tell you, I want you to ask me questions, I can't go through it all again. So, I asked him questions.

Q. Did you ask him questions?

A. Yes.

Q. What did you ask him first?

A. First question I asked him was: how did you really get those cuts. Previously he told us he got the cuts during an assault, he was assaulted by some people up in the Waterbury area. And, his

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to the killings?

A. I might just add that he also--I'm quite sure that he made it clear that it was possible if Mr. Acquin wanted to have counsel present.

Q. I see. This was before he gave the confession?

A. That's correct.

Q. What happened after he said that?

A. Then Mr. Acquin went into his statement.

Q. I see. Do you recall--this is an oral statement?

A. It was a spontaneous oral statement."

reply to my question was that he didn't get the cuts from those guys the way he told me.

Q. And--

A. And, then I asked him: did you kill all those people. And, he said: yes, he did. And, then without any further questions for quite some time, he went into a narrative about what happened the night before."

The defendant claims that the facts before us establish as a matter of law that his confession was obtained in violation of his constitutional rights. We disagree.

Any inquiry into the admissibility of a confession obtained while a defendant is in custody must of course begin with Miranda v. Arizona, supra. In that case, the United States Supreme Court held that the fifth and fourteenth amendments' prohibition against compelled self-incrimination requires that a suspect in police custody be informed specifically of his or her right to remain silent and to have an attorney present before being questioned. Miranda v. Arizona, supra, 444, 479. The

court further held that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease"; Id., 473-474; and "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Id., 474. Furthermore, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Id., 475. The standard for waiver is that announced in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938): "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. . . .[which] must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Accord, North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.

Ed.2d 286 (1979); State v. Wilson, Conn. (42 Conn.L.J., No. 37, p. 1)(1981).

The Supreme Court recently reconfirmed the principles stated above in Edwards v. Arizona, supra, where the court held: "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities unt i counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Id., 484-85.

The defendant contends that Edwards v. Arizona, supra, establishes a per se rule that once an accused has asked for counsel, any further questioning of any kind by the police violates his fifth amendment rights.

We do not, however, construe the Edwards opinion so broadly. To do so would transform the Miranda safeguards "into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." Michigan v. Mosley, 423 U.S. 96, 102, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). We believe that the Edwards opinion is a restatement of existing principles of constitutional law, and is not intended to overrule decided cases. Edwards does not prohibit communication between police and a suspect who has requested an attorney. Rather it prohibits the use of confessions obtained when police "initiate" renewed custodial interrogation after such a request. The Supreme Court has stated quite clearly that the Miranda safeguards are relevant only when an in-custody accused is subjected to interrogation. "'Interrogation'" means "any words or actions ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d

297 (1980). See State v. Falby, 187 Conn. 6, 15, 444 A.2d 213 (1982); State v. Graham, 186 Conn. 437, 443, 441 A.2d 857 (1982). The per se rule suggested by the defendant would negate the holding in Innis by forbidding any conversation initiated by police after a request for counsel whether or not "likely to elicit an incriminating response." But the majority in Edwards was careful to disavow any intention to overrule the interrogation requirement of Miranda and Rhode Island v. Innis, supra, stating: "The Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation [absent which] ... there would have been no infringement of the right that Edwards invoked . . . ." Edwards v. Arizona, supra, 485-86.

The relevant inquiry when a defendant has clearly invoked his right to counsel is to ask, first, was there in fact interrogation and, second, did the police initiate it. Edwards v. Arizona, supra, 490 (Powell, J., concurring in the

result).[10]

It is unquestioned that Acquin was read the Miranda rights before any statement was taken, and it appears clear from the record that he understood those rights. It is also undisputed that he specifically requested an attorney at 5:45 p.m. ("I think I'm in trouble. I think I better get a lawyer."), and that he confessed several hours after that request. Edwards and Miranda require, therefore, that we examine two incidents which occurred after the defendant's request: (1) McDonnell's inquiries about whom the defendant wanted as an attorney; and (2) the events immediately following the arrival of Albert in Bethany, which immediately preceded the

10 Our conclusion that Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, reh. denied, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981), does not announce new principles is supported by most courts which have ruled on the question. See United States v. Halliday, 658 F.2d 1103 (6th Cir. 1981); Richardson v. State, 625 S.W.2d 504, 507 (Ark. 1981); People v. Denby, 102 Ill. App. 3d 1141, 430 N.E.2d 507 (1981); Bryant v. State, 49 Md. App. 272, 431 A.2d 714 (1981); State v. Scott, 626 S.W.2d 25 (Tenn. Crim. App. 1981).

confession.

1

Inquiries about Counsel

When Acquin said, "I think I better get a lawyer," Hamila, who was questioning him, stopped immediately and reported the request to his superior, McDonnell. McDonnell proceeded to ask further questions of the defendant in an attempt to ascertain whom he wanted to represent him. McDonnell offered to call: Acquin's previous attorney, any other attorney, and the public defender. Acquin said he didn't want any of them. McDonnell then offered to find Acquin's brother, who he thought was "in the building someplace" and have him obtain an attorney. Again Acquin refused the offer, indicating that "he didn't want his brother to know that he was involved ...." On further inquiry about how to find a lawyer, Acquin indicated that "it wasn't really an attorney that he wanted, it was just somebody that he could trust," and asked that Albert be present before he made a statement. Acquin told McDonnell "that as soon as Dr. Albert got there that he would tell...the truth about what happened the night be-

fore." McDonnell then ordered a search for Albert.

The questions asked by McDonnell were not interrogation. They were not of the kind likely to elicit an incriminating response. Rather, they were limited to information which would allow McDonnell to comply with the defendant's request for counsel by ascertaining who should be called. Questions of this type, when limited to finding the attorney of the suspect's choice, are not forbidden by Miranda and its progeny. The right to counsel is of little use to an accused if police are not allowed to ascertain whom to summon. McDonnell suggested several different ways for the defendant to obtain legal advice, and even offered to call the defendant's brother. Such carefully limited questions cannot reasonably be considered interrogation, and would be proper whether or not the defendant's request for counsel was "equivocal." See Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) (en banc).[11]

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11 See discussion of this case, infra, 673.

2

The Confession

Albert arrived in Bethany at about 11:40 p.m., more than five hours after Acquin told McDonnell that he would "tell the truth about what happened last night" if Albert were present. The two met alone, very briefly, and then Albert called McDonnell back into the room. McDonnell was careful to explain that Albert was not an attorney, and that if Acquin said anything to Albert in McDonnell's presence, it could be used in court. McDonnell testified on direct examination to the ensuing conversation: "[I] then asked Lorne Acquin: do you want to tell us what happened last night. And, he said: no, I don't want to tell you. ... I said: well, I thought you said when Dr. Albert got here that you would tell us the truth about what happened last night. And, he said: well, what I mean is, it's--I don't want to tell you, I want you to ask me questions, I can't go through it all again. So, I asked him questions." A detailed confession followed.

Edwards v. Arizona, supra, holds that confessions obtained after a request

for counsel are inadmissible if they are the result of renewed custodial interrogation "initiated" by the police. In Edwards, the defendant was arrested for robbery, burglary and murder, advised of his rights, and then questioned about the crimes. After giving a statement presenting an alibi defense, Edwards sought to make a deal. He then stated: "'I want an attorney before making a deal.'" Police immediately ceased all questioning, and Edwards was locked up. The next morning, two detectives came to the jail and asked to see Edwards, who told the guard that he did not want to talk to anyone. The guard replied that "'he had'" to talk to them, and took him to an interrogation room where he was played a recording of an "alleged accomplice who had implicated him" in the crimes. Edwards then gave a second statement which incriminated him. Edwards v. Arizona, supra, 478-79. It was the second statement which was excluded by the Supreme Court decision in Edwards.

We have already indicated that we do not read Edwards to prescribe a per se rule that a confession which follows any

conversation initiated by police after a request for counsel must be suppressed. We agree with Justice Powell, concurring in Edwards v. Arizona, supra, 488-492, that "few cases will be as clear as [Edwards]. Communications between police and a suspect in custody are commonplace. It is useful to contrast the circumstances of this case with typical, and permissible, custodial communications between police and a suspect who has asked for counsel. For example, police do not impermissibly 'initiate' renewed interrogation by engaging in routine conversations with suspects about unrelated matters. And police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney. E.g., State v. Turner, 32 Ore. App. 61, 65, 573 P.2d 326, 327 (1978); State v. Crisler, 285 N.W.2d 679, 682 (Minn. 1979); State v. Marcum, 24 Wash. App. 441, 445-446, 601 P.2d 975, 978 (1979)." Id., 490.

Unquestionably, the defendant invoked his right to counsel. "I think I better get a lawyer" could hardly be more clear; however, subsequent legitimate

questions to find out whom he wanted showed that the request was not as unequivocal as it appears to be on its face. Acquin stated, among other things, that "it wasn't really an attorney that he wanted, it was just somebody that he could trust. He wanted to sit and have somebody sitting with us that he trusted before he had any further conversation."

We note in this regard Fifth Circuit cases which foreshadowed the decision in Edwards v. Arizona, supra, and which the Edwards majority approved: "The rule in the Fifth Circuit is that a knowing and intelligent waiver cannot be found once the Fifth Amendment right to counsel has been clearly invoked unless the accused initiates the renewed contact. See, e.g., United States v. Massey, 550 F.2d 300 ([5th Cir.] 1977); United States v. Priest, 409 F.2d 491 ([5th Cir.] 1969). Waiver is possible, however, when the request for counsel is equivocal. Nash v. Estelle, 597 F.2d 513 ([5th Cir.] 1979) (en banc). See Thompson v. Wainwright, 601 F.2d 768 ([5th Cir.] 1979)." Edwards v. Arizona, supra, 486 n. 9.

In Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) (en banc), in upholding the admission of a confession, the court stated: "When police stop interrogation as required [after a request for counsel], admissions that later come at the initiative of a suspect are subject to the traditional analysis for voluntariness.... The same principle governs when...a suspect who has been informed of his rights expresses both a desire for counsel and a desire to continue the interview without counsel. Where the suspect's desires are expressed in such an equivocal fashion, it is permissible for the questioning official to make further inquiry to clarify the suspect's wishes." (Citations omitted.) Id., 517. In Nash v. Estelle, supra, the accused, Nash, was advised of his rights prior to questioning. His "equivocal" request for counsel began unequivocally: "Nash: Well, I don't have the money to hire one, but I would like, you know, to have one appointed. [Prosecutor] Files: You want one to be appointed for you? Nash: Yes, sir." Id., 516. The relevant dialogue is quoted in the

footnote.[12] In Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979), also cited in Edwards v. Arizona, supra, the Fifth Circuit clarified the rule: "[W]henever even an equivocal request for an attorney

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12 "Nash: 'I understand that I do--I don't have to tell him anything, and what I say can be used against me in Court. I do not want to--I mean I do not want to have a lawyer present in Court, I mean at this time.

Files: The the place under that is--

Nash: If I want a lawyer present, I just put down I want him present?

Files: Please just tell us about it. Any time we are talking and you decide that you need somebody else here, you just tell me about it and we will get somebody up here.

Nash: Well, I don't have the money to hire one, but I would like, you know, to have one appointed.

Files: You want one to be appointed for you?

Nash: Yes, sir.

Files: Okay. I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.

Nash: But, uh, I kinda, you know, wanted, you know, to talk about it, you know, to kinda, you know, try to get it straightened out.

Files: Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off, I can't talk to you. It's your life.

is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified. When and if it is clarified as a present desire for the assistance of legal counsel, all interrogation must cease...." (Emphasis in original.) Thompson v. Wainwright, supra, 771.

Nash: I would like to have a lawyer, but I'd rather talk to you.

Files: Well, what that says there is, it doesn't say that you don't ever want to have a lawyer, it says that you don't want to have a lawyer here, now. You got the right now, and I want you to know that. But if you want to have a lawyer here, well, I am not going to talk to you about it.

Nash: No, I would rather talk to you.

Files: You would rather talk to me. You do not want to have a lawyer here right now?

Nash: No, sir.

Files: You are absolutely certain of that?

Nash: Yes, sir.

Files: Go ahead and sign that thing." Nash v. Estelle, 597 F.2d 513, 516-17 (5th Cir. 1979) (en banc).

We believe that Edwards v. Arizona must be read to include this common-sense Fifth Circuit rule, which was implicitly approved by the majority, and specifically stated in Justice Powell's concurring opinion.[13]

In the case before us, the defendant's request for counsel was more "equivocal" than Nash's. Although, like Nash,

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13 "[P]olice legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney." Edwards v. Arizona, 451 U.S. 477, 490, 101 S.Ct. 1880, 68 L.Ed.2d 378 (Powell, J. concurring in the result), reh. denied, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981). This rule is also in accord with the decision in State v. Scott, 626 S.W.2d 25 (Tenn. Crim. App. 1981). There, the police stopped questioning when the defendant requested counsel. On his way to the holding cell, however, the defendant stopped to talk to his girlfriend. The escorting officer "heard her informing appellant he should tell the truth. [The officer then] asked appellant if he wanted to talk about it or go ahead to the detention area." Id., 29. The court held that "[t]hese facts cannot be equated with a resumption of the interrogation as condemned by Edwards v. Arizona, supra." Ibid.

Acquin clearly asked for counsel, he also rejected every suggestion for obtaining an attorney, including talking to his own brother. Instead he stated that he would "tell the truth" if the police allowed Albert to be there. The trial court found that "the defendant's request for counsel was indecisive and under the circumstances Captain McDonnell was correct in making an inquiry into whether the suspect did or did not want counsel present." The record amply supports the trial court's conclusion that the defendant's request was "indecisive" and therefore equivocal. We cannot therefore say that this conclusion is clearly erroneous under the well-established standard of factual review. Practice Book §3060D; Kaplan v. Kaplan, 186 Conn. 387, 392, 441 A.2d 629 (1982); Pandolphe's Auto Parts, Inc. v. Manchester, 181 Conn. 217, 221-22, 435 A.2d 24 (1980).

The finding of indecisiveness alone, however, does not settle the question of admissibility of the confession. This exception to the general rule of Edwards is very narrowly circumscribed. The facts of this case demonstrate the limits of the

inquiry which can be made. McDonnell limited his clarifying questions carefully to the subject of whom Acquin wanted as his counsel. No question implied in any way that the request might be denied, or that it would be advisable to talk before obtaining counsel. Five hours passed before Albert arrived. McDonnell then told Acquin that the doctor was there and asked whether he still wanted to see him and to give a statement. The defendant answered affirmatively. Albert and Acquin conferred alone, then Albert called McDonnell in. McDonnell again explained the legal consequences of making a statement[14] and then asked whether Acquin wanted to tell them what happened the night before. When Acquin said "I don't want to tell you," McDonnell expressed his confusion, whereupon Acquin explained "[w]ell, what I mean is...I don't want to tell you, I want you to ask me questions ...." This clarification from the defendant indicated his desire to talk. The scope of questioning here compares favor-

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14 See footnote 7, supra.

ably with that of the prosecutor in Nash v. Estelle, supra, 516. The inquiries of McDonnell were limited to those necessary to ascertain that he was aware of the consequences of giving a statement.

The defendant's confession was not obtained in violation of Edwards v. Arizona, supra, because his request for counsel was equivocal.

3

Waiver

Our conclusion that the defendant's confession is not made inadmissible solely because he had previously asked for an attorney does not end the inquiry. The trial court correctly stated that "[t]he next question is whether the defendant 'voluntarily, knowingly and intelligently' waived his rights. The state has a 'heavy burden' of demonstrating that the suspect's constitutional rights have been respected. State v. Darwin, 29 Conn. Sup. 423, 432 [290 A.2d 593 (1972)]. Waiver has been defined as 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v.[Zerbst], 304 U.S. 458, 464 ... 58 S.Ct. 1019, 1023, 82 L. Ed. 1461, 1466 [1938]. This standard is

applied to an in-custody interrogation. Miranda, supra, 475." A finding of waiver involves two interrelated factual determinations: (1) did the defendant understand his rights; and (2) did he voluntarily relinquish them. State v. Wilson, Conn. (42 Conn. L.J., No. 37., pp. 1, 3) (1981); State v. Derrico, 181 Conn. 151, 157-58, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S.Ct. 789, 66 L.Ed.2d 607 (1980); North Carolina v. Butler, supra. The trial court in its discretion makes these determinations, but that discretion must be "exercised in accordance with constitutional standards of due process." State v. Derrico, supra, 162-63. The trial court found, and the record indicates, that the defendant was given the Miranda warnings five times, that he understood his rights, and that neither threats nor physical force were used on the defendant. Moreover, the defendant had been arrested and advised of his rights several times before. One of the unusual facts of this case is that Albert, a professional psychiatrist who was called to the scene at the defendant's request, was present during the events leading up

to the confession. He witnessed the entire confession, and testified that in his opinion the defendant "seemed collected," and understood the meaning of the warnings given to him. Albert also stated that the confession was given "spontaneously" and that he felt the defendant had a psychological need to tell the story. Acquin also indicated twice that he wanted to tell the truth, but that he just wanted somebody he could trust (Albert) to be there.

We cannot say that, on the basis of the evidence before it, the trial court erred in concluding that the defendant knowingly and voluntarily waived his rights to counsel and to remain silent. There is simply no evidence that the circumstances were such as to "'overbear... [the accused's] will to resist....'" State v. Devine, 149 Conn. 640, 653, 183 A.2d 612 (1962); Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed. 2d 1037 (1961).

On the basis of the foregoing we conclude that the trial court did not err

in admitting the defendant's confession.[15]

II

THE HEARSAY STATEMENT

At trial the defendant offered in evidence a signed written statement given to a state policeman by John Ricciuti,

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15 The defendant also claims that his confession was illegally obtained because at approximately 6:30 p.m. McDonnell "asked him [Acquin]: what other scratches he had beside the one[s] I can see on his face and his arms." Acquin responded by dropping his trousers to show a scratch or burn mark on his thigh. The defendant now contends that McDonnell's question violated the rule in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, reh. denied, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981), and that his confession therefore should have been suppressed.

We do not consider this episode to merit extensive discussion for several reasons. First, as outlined above, the request for counsel was equivocal and, therefore, did not bar all further questions. Second, there was no causal connection between the "scratches" question and the confession made more than five hours later after Albert had arrived and spoken to Acquin. See Edwards v. Arizona, supra, 488-92 (Powell, J., concurring in the result); Michigan v. Mosley, 423 U.S. 96, 107-11, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) (White, J., concurring in the result). Cf. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975);

owner of a bar which the defendant had visited the night of the murders. Ricciuti, a fugitive from New Jersey authorities, could not be located and was unavailable to testify. The statement indicated that the defendant was not drunk at 1 a.m., and therefore contradicted the testimony of Deborah Veilleux that the defendant had slurred speech and "walked kind of staggered." The court refused to admit the Ricciuti statement on the ground that it was hearsay.

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Finally, it is an open question whether the "scratches" episode can be considered interrogation at all, because the defendant was asked only to supply nontestimonial evidence of the condition of his body which he might have been compelled to give without any violation of his constitutional rights, whether or not counsel was present. See Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); see also United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 21 1149 (1967); State v. Adams, 176 Conn. 138, 141-42, 406 A.2d 1 (1978); State v. Chesney, 166 Conn. 630, 640-41, 353 A.2d 783, cert. denied, 419 U.S. 1004, 95 S. Ct. 324, 42 L.Ed.2d 280 (1974) and cases cited therein.

Unquestionably the statement was hearsay, and therefore admissible only if permitted under some exception to the rule. Izzo v. Crowley, 157 Conn. 561, 563, 254 A.2d 904 (1969); see Tait & LaPlante, Handbook of Connecticut Evidence (1976) c. 11. The defendant has not shown or even argued that the Ricciuti statement comes within any exception recognized in Connecticut. See, e.g., State v. Gold, 180 Conn. 619, 630, 431 A.2d 501, cert. denied, 449 U.S. 920, 101 S.Ct. 320, 66 L.Ed.2d 148 (1980); State v. DeFreitas, 179 Conn. 431, 450-41, 426 A.2d 799 (1980). Moreover, here, the trial court specifically found that "there was no evidence that the circumstances surrounding the statement provide any sanction for ascertaining its truth..."; that is, the trial court did not find it trustworthy.[16]

16 Because of this conclusion by the trial court, we need not review whether the statement can be considered exculpatory as we defined the word in State v. Gold, 180 Conn. 619, 630 n. 5, 431 A.2d 501, cert. denied, 449 U.S. 920, 101 S.Ct. 320, 66 L.Ed.2d 148 (1980).

Nothing before us indicates that this determination was an abuse of discretion, and we find no error in the trial court's decision to exclude the statement.

III

CHALLENGE TO THE JURY ARRAY

The jury array from which the jury panel was chosen in this case was 44.82 percent female, while 52.69 percent of registered voters in New Haven County were female, a difference of 7.87 percent. The defendant, after presenting only these facts to the trial court, moved to dismiss the jury panel on the ground that the array from which it was selected was not a fair cross-section of the community. The trial court denied the motion, stating that the difference was statistically significant but that it did not constitute in any way an unrepresentative or unfair cross-section of the community.

"In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group

in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." State v. Frazier, Conn. (43 Conn.L.J., No. 6, pp. 16, 17) (1981), quoting Duren v. Mississippi, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L.Ed.2d 579 (1979).

The defendant presented no evidence whatsoever to show that this underrepresentation was due to systematic exclusion of the group. State v. Frazier, supra, 18. Therefore, he failed to make the required prima facie showing, and there was no error in the denial of his motion.

There is no error.

In this opinion the other judges concurred.

APPENDIX B

(13052)

STATE OF CONNECTICUT

At A Superior Court Held At Waterbury, Within And For the Judicial District Of Waterbury, On The Thirtieth Day of November, A.D., 1979.

State of Connecticut

VS.

Lorne Acquin, of Waterbury

JUDGMENT

Upon the application of Walter Scanlon, Assistant State's Attorney for the Judicial District of Waterbury, a Bench Warrant was issued on July 23, 1977, charging Lorne Acquin with the crime of murder in violation of Section 53a-54a of the General Statutes and of the crime of Arson in violation of Section 53a-111 of the General Statutes, and said action came thence to July 24, 1977, when said defendant appeared, and said action came thence to August 2, 1977, when, upon application by the State's Attorney, a Grand Jury was summoned and ordered to convene on September 7, 1977, and said action came thence to September 7, 1977, when said Grand Jury returned a true bill

on each of nine said charging said defendant with the crime of intentional murder in violation of Section 53a-54a of the General Statutes and in each of said counts, and said action came thence to September 15, 1977, when the defendant again appeared and entered a plea of Not Guilty to each of the nine (9) counts of said Grand Jury Indictment and to an Information charging said Lorne Acquin with the crime of Arson in the First Degree, in violation of Section 53a-111 of the General Statutes, and elected a trial by jury as to both the Indictment and Information charges, and said action came thence to May 21, 1979, all pretrial motions having been heard, the trial of said action to the jury commenced, and thence to October 18, 1979, when all evidence having been submitted, said action was committed to the jury, and thence to October 19, 1979, when jury returned a verdict of Guilty on each of nine counts of Murder and on one count of Arson in the First Degree, and when said defendant filed a Motion for New Trial and a Motion for Acquittal, and when said action was continued to November 30, 1979, for sentencing and when a pre-

sentence investigation and report was ordered, and thence to November 20, 1979, when the Motions for New Trial and for Acquittal were denied, and thence to the present time when the defendant appeared for sentencing.

Whereupon, It Is Adjudged that the defendant, Lorne Acquin, be committed to the custody of the Commissioner of Corrections, at Somers, for a period of not less than 25 years nor more than life on the first count of said indictment, and to a period of not less than 10 years nor more than life on each of the other eight counts of said indictment, said sentences on all nine counts to run consecutively. Further, said defendant Lorne Acquin is committed to the custody of said Commissioner of Corrections, at Somers, for a period of not less than 10 years nor more than 20 years on the charge of Arson in the First Degree, said sentence to run concurrent with the sentences imposed on the nine counts of said Indictment, effective sentence, 105 years to life.

By the Court

Francis J. Butler
Clerk

APPENDIX C

NO. 9891

STATE OF CONNECTICUT SUPREME COURT

VS. STATE OF CONN.

LORNE J. ACQUIN JULY 27, 1982

MOTION TO REARGUE

Pursuant to Sections 3111, et seq., of the Practice Book, the defendant moves to reargue the appeal in this case for the following reasons:

1. In State v. Ostroski, ___ Conn. ___, 440 A.2d 166, 167 (1981), this court expressly held: "Whether and when a person is taken into custody is a question of fact....It is the function of the trial court, not this court, to find facts. Whether or not the defendant was in custody is a critical threshold question which must be determined before we can properly review the claims made in this appeal." (Emphasis supplied.)

2. This court's opinion in the present case, 187 Conn. 647, consists primarily of findings of facts, most of which were not found by the trial court and most of which are and were actively contested between the parties and among the witness-

es. These factual findings by this court are a crucial part of the court's opinion. This court, in its opinion, neither overruled, cited nor distinguished its holding in Ostroski, supra.

3. This court has no jurisdiction to sit as a finder of facts and, because it neither sees nor hears any of the witnesses, is uniquely unqualified for such a function.

4. Neither at nor before oral argument were the parties advised that this court would sit as a trier of facts. Accordingly, no effort was made by the parties to marshall their evidence nor to persuade the court to adopt one or another disputed factual claim. For this court to sit, as it has in this case, as a trier of disputed facts and decide which witnesses it believes and which it does not -- without advance notice to the parties and in contravention of established Connecticut law -- denies this defendant due process of law in violation of the Fourteenth Amendment to the United States Constitution. Moreover, because Lorne J. Acquin is the only appellant in Connecticut history who has lost an appeal in this

court because this court chose to sit sue sponte as a trier of disputed facts, the court's action deprives Mr. Acquin of equal protection of the laws in violation of the Fourteenth Amendment.

5. As in Ostroski, supra, the trial court in this case made no factual finding as to "whether and when [Mr. Acquin was] taken into custody...." 440 A.2d at 167. Nevertheless, this court in violation of its holding there found that he was taken into custody at 2:00 P.M., as the state claimed, rather than at 9:30 A.M., as the appellant claimed. This court had no power to make such a finding of fact.

6. The court below, in its findings of facts, expressly assumed that the defendant was arrested without probable cause. It made no findings as to what facts the police did or did not know at various points in the arrest proceedings. [See Appendix to brief of appellant, pp. A-70, et seq.] This court chose to find as a fact that there was probable cause to arrest Mr. Acquin, and made that finding upon the basis of this court's own, sua sponte, findings of subordinate facts

which (a) were not found by the court below and (b) have not been agreed to by the parties and (c) are, in fact, hotly disputed. Among other things:

A. This court found that the defendant "voluntarily agreed to accompany the officers...to Meriden." There was no such evidence and no such finding by the court below. In fact, after the defendant had entered the police cruiser he was subjected to a police search and seizure of his property [7/5/78 Tr. p. 13; 7/11/78 Tr. p. 82; 7/13/78 Tr. pp. 38, 41, 43, 44; 9/14/78 Tr., Stipulation, p. 41] and the officers then were "instructed" to take Mr. Acquin to Meriden without regard to his wishes or willingness to go. [7/5/78 Tr. p. 15; 7/17/78 Tr. p. 12] Trooper Blais then informed Mr. Acquin "that we... were to go to the Meriden Complex for the interview." Mr. Acquin "asked why we were going to Meriden," and Blais responded: "That is where we were told to go." [7/13/78 Tr. p. 63] It is impossible to imagine on what basis this court reached its finding that Mr. Acquin "voluntarily agreed to accompany the officers...to Meriden," on the basis of such testimony

in the trial court. 187 Conn. 656.

B. This court found as a fact that Mr. Acquin had been at the Beaudoin house "from at least 7:30 to 10 p.m. on the previous evening, July 21." 187 Conn. at 657. The court below made no such finding and there is no such evidence. Indeed, Alden Brooks himself (mentioned at page 658 of the Court's opinion) had given a written statement to the State Police at 8:40 A.M. on July 22, 1977, stating that he was at the Beaudoin house from approximately 9:00 P.M. until approximately 10:45 P.M. and Mr. Acquin was not there at all during that time. That statement was in evidence before the trial court and was submitted to this court as part of the appeal.

C. This court found as a fact that "Acquin had recent scratches on his face...." 187 Conn. at 657. The court below made no such finding and this issue is very much in dispute. At oral argument, defense counsel expressly argued to this court that a viewing of the photographs taken of the defendant after he had signed his confession would demonstrate only minimal marks on his body and not the sort of markings claimed by certain police

witnesses.

D. This court found as a fact that "Acquin...had not mentioned it [being mugged the previous evening] at all in his oral statement to the police at approximately 9:30 a.m." 187 Conn. at 657-58. The trial court made no such finding and, in point of fact, the evidence at the suppression hearing was to the contrary. It was testified at the suppression hearing that when Mr. Acquin entered the police cruiser with Troopers Blais and Hamila, the police asked him about the scratch on his face. Mr. Acquin responded that he had sustained the scratch in a fight the previous night, when he had been jumped and robbed. [7/24/78 Tr. pp. 17-18]

E. This court found as a fact that Mr. Acquin was not in custody while in the Meriden police headquarters and that the defense had made no claim that he was restrained there. 187 Conn. at 655-56. Of course, the court below made no such finding. As a matter of fact, moreover, Lt. Shay himself testified at the suppression hearing that when Mr. Acquin was taken to Meriden he was "a very serious suspect in this case" and that he

was undecided whether he would ever again permit Mr. Acquin to leave police custody. He testified that "a lot would depend on what he said and how he acted." [7/17/78 Tr. pp. 100-01, 7/6/78 Tr. pp. 15-16] It was Shay who was in charge of the investigation and, although this Court found that the police agreed to take Mr. Acquin home after the Meriden interrogation, the evidence at the suppression hearing showed that while Acquin was still in Meriden Shay expressly ordered "that Acquin should not be released" and further ordered Trooper Zdanowicz to take him at once to the State Police barracks at Bethany. [7/6/78 Tr. pp. 58-59, 117, 112; 7/17/78 Tr. pp. 14-15, 99]

F. This court found as a fact that Mr. Acquin had a reputation as a violent person. 187 Conn. at 658. The trial court made no such finding. Contrary to this court's claim, that assertion certainly is not "uncontested" and in fact is denied. Mr. Acquin's police record was made an exhibit at the suppression hearing, was submitted to this court as part of the appeal, and shows no crimes of violence ever having been alleged against Mr. Acquin.

G. This court found as a fact that Alden Brooks had "offered an acceptable account of his own whereabouts" prior to Mr. Acquin's arrest. 187 Conn. at 658. The trial court made no such finding. Although there was evidence below that Brooks had given the police a statement prior to 9:00 A.M., there was absolutely no evidence that the police considered it "an acceptable account...." On the contrary, Lt. Shay testified that he still considered Brooks a suspect after that time and many witnesses -- including Brooks himself -- testified that in fact his statement had been false. In fact, he claimed to have been having sex with Mrs. Beaudoin on her porch shortly before the time at which she was murdered.

7. This court found as a fact that, after Mr. Acquin had asked for an attorney and had been further questioned, "McDonnell, Hamila and Acquin drove to a restaurant nearby, where they ate hamburgers in the police cruiser." 187 Conn. at 662. The court below made no such finding, and Mr. Acquin testified directly to the contrary. He testified that he was afraid to eat anything. "They might have put something in

the food or the drink." [9/5/79 Tr. p. 33]

8. This court found as a fact that "[i]t is unquestioned that Acquin was read the Miranda rights before any statement was taken...." 187 Conn. at 669. Although the court below found that Mr. Acquin was read his Miranda rights during the morning and once in the early afternoon, there is no finding by the trial court that the rights were read before the statement was taken. On the contrary, the court below expressly found that the rights were given before the written confession but made no finding as to whether they were given before the oral confession which preceeded it. [Appendix to appellant's brief, p. A-69.] As a matter of fact, there was testimony that such rights were not read at Bethany until after the oral confession had been concluded.

9. At 187 Conn. pp. 663-65, 670-71 and 676, this court makes detailed findings of fact concerning the events at the Bethany state police barracks beginning with the arrival of Dr. Joel Albert. The court below made none of these findings. Moreover, in making the findings here,

this court accepted as true portions of the testimony of Dr. Albert and portions of the testimony of Captain McDonnell, disregarded conflicting portions of the testimony of both witnesses, and chose not to believe the directly contrary testimony of the appellant concerning these very events. As but one example, this court found, 187 Conn. at 663: "Neither Acquin nor Albert mentioned an attorney." Contrary to this court's finding, Mr. Acquin testified in part as follows:

> Q: And, tell us exactly what happened [when Dr. Albert arrived].
> A: He came in and he was joking and laughing with McDonnell. And, he saw me. He straightened up. I got up to shake his hand. I said, 'Hi, Doc, how are you doing.' He said, 'All right.' I said, 'Can we talk alone?' He turned around and asked the Captain. The captain left.
> Q: And, now, how excatly did he greet you?
> A: Placed his arm around me, shook my hand.
> Q: And, then he asked Captain McDonnell if --
> A: If he could be alone with me.
> Q: What happened then?
> A: We sat down and we talked.
> Q: Tell us what was said.
> A: I says, "Doctor Albert,' I says, 'these guys are trying to get me for nine counts of murder. They

won't let me see nobody, call nobody. I want to give you my attorney's number so you can call him for me.'

Q: And what happened then?

A: He said no.

Q: He said no?

A: Well, he said, 'I don't think I can do that.'

Q: What was your reaction to that?

A: The bottom fell out.

Q: What do you mean by that?

A: I had nowhere to turn, nobody to trust. I couldn't get in contact with nobody. My own psychiatrist turned on me.

Q: Did you come to any decision at that point?

A: I might as well go along with what anything they had to say.

[9/5/79 Tr. pp. 38-39]

10. This court held, 187 Conn. at 678: "We cannot say that, on the basis of the evidence before it, the trial court erred in concluding that the defendant knowingly and voluntarily waived his rights to counsel and to remain silent. There is simply no evidence that the circumstances were such as to 'overbear...[the accused's] will to resist....'" (Emphasis supplied.) This court's holding in that regard is directly contrary to the facts clearly set forth in the record and in the transcript of the suppression hearing which this court

so freely consulted in making the findings of fact recited above and others. The court below found: "Both sides used expert psychiatric testimony regarding the defendant's mental ability to make a voluntary confession at the suppression hearing." [Appendix to appellant's brief, p. A-80] Thomas Szasz, M.D., a psychiatrist with an international reputation as an expert witness in judicial proceedings, testified on behalf of the appellant that "Mr. Acquin's ability to give voluntary consent was completely overwhelmed and negated by the experiences to which he was exposed prior to the confession and during it." [7/26/78 Tr. p. 32] He elaborated extensively upon that conclusion in his testimony at the suppression hearing. [Id., pp. 33-35, 43-44, 46-47, 56, 59-60, 65-66, 84, 86-89, 113, 124] Richard J. Loewenstein, M.D., a member of the faculty of the Yale Medical School and the Chief Resident Psychiatrist at Yale-New Haven Hospital [7/9/78 Tr. pp. 4-5], testified as an expert defense witness at the suppression hearing that "in the context given, given the extremely stressful situation that Mr. Acquin was under, moving

about, questioning, repeated questioning, statements being taken, further statements being taken,... sitting with the police throughout an entire day, being taken from place to place, that this was a highly stressful circumstance, that that is demonstrated by the statement of Captain McDonnell and the conversation that is recorded there, leading up to the request for Dr. Albert and that given that context of things, that the effect of Dr. Albert was the final and culminating factor, which led to the overwhelming of Mr. Acquin's resistance to confessing and that because of the manner in which it took place, it could not be construed that the confession took place voluntarily...." [Id., p. 98] Based upon an analysis of Dr. Albert's own testimony in the context of his detailed review of all the evidence at the suppression hearing, moreover, Dr. Loewenstein further concluded: "Dr. Albert's behavior and activities were such as to so overwhelm Mr. Acquin that, in no way, could the confession be construed as voluntary." [Id., at p. 35] As the Fourth Circuit noted in Ferguson v. Boyd, 566 F.2d 873, 877 (4th Cir. 1977): "It has long been

recognized that involuntary confessions may be exacted as a result of mental coercion as well as physical abuse." See People v. Parks, 579 P.2d 76 (Colo. 1978); Commonwealth v. Irvin, 341 A.2d 132 (Pa. 1975).

11. This court is without power to engage in fact-finding as it did in this case. The opinion of the court depends upon such fact-finding upon disputed material evidence, and therefore the opinion cannot stand if this court is to follow the law it has itself articulated within the last year.

12. Having chosen to engage in fact-finding, this court cannot consistent with due process of law find material facts which are directly contrary to the evidence presented to the court below. With respect to the psychiatric testimony, as with respect to many other aspects of its opinion, this court did find material facts directly contrary to the evidence presented to the court below.

13. One of the ways in which this court inaccurately characterized the evidence was the essential but false factual finding upon which the court based its

ruling that the challenge to the jury array was properly overruled. This court found: "The defendant presented no evidence whatsoever to show that this underrepresentation was due to systematic exclusion of the group. ...Therefore, he failed to make the required prima facie showing, and there was no error in the denial of his motion." 187 Conn. at 681. This court's finding is totally contrary to the facts. As was pointed out in the appellant's brief, pp. 64-65, the appellant and the state entered into a stipulation of facts with respect to the challenge to the array. [4/23/79 Tr. pp. 3, et seq.] It was stipulated that all the members of the jury array were categorized by the Judicial Department by sex in official records. [Ibid.; Ex. 1 at Ch. to Array hearing.] It was stipulated that the jury committees from all the towns in the Judicial District submitted names to the Jury Commission for inclusion on the jury array; that questionnaires were mailed to each of those persons and were returned by them to the Jury Commission; that the jury commissioners thereupon selected the array upon the basis of the information contained in the question-

naires, which included the sex of each person responding. And it was stipulated that the array consisted of 2,336 persons selected individually in that manner. [Id., at pp. 5-6] Thus, a prima facie case was made out by the appellant because he proved without contradiction that (1) women were underrepresented on the array to a statistically significant degree; and (2) the officials who selected the array had an opportunity to discriminate. E.g., State v. Nims, 180 Conn. 589, 430 A.2d 1306 (1980); Casteneda v. Partida, 430 U.S. 482 (1977); Villafane v. Manson, 504 F.Supp. 78 (D.Conn.), aff'd 639 F.2d 770 (2d Cir. 1980).

14. For all these reasons, the opinion of this court should be vacated and this case should be set for re-argument.

THE DEFENDANT-
APPELLANT,

LORNE J. ACQUIN

BY

JOHN R. WILLIAMS
His Attorney

APPENDIX D

NO. 9891

STATE OF CONNECTICUT SUPREME COURT

VS. STATE OF CONNECTICUT

LORNE J. ACQUIN SEPTEMBER 22, 1982

O R D E R

THE DEFENDANT'S MOTION TO REARGUE HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

Donald H. Dowling
CHIEF CLERK

APPENDIX E

MOTION TO SUPPRESS CONFESSION, STATEMENTS AND ADMISSIONS

The defendant moves to suppress any and all statements, confessions and/or admissions made by him to any official of the State of Connecticut or any of its subdivisions, on July 22, 1977, or at any time thereafter. The defendant further moves to suppress any and all direct and/or indirect fruits of any such statement, confession or admission. The defendant further moves to suppress any and all testimony concerning any of the foregoing. In support of this motion the defendant represents as follows:

1. All such statements are the fatally-tainted fruit of his initial arrest in this case. Such arrest was made in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution and under Article I of the Connecticut Constitution because it was made without probable cause and without a warrant.

2. Any and all such statements, confessions and/or admissions were obtained

in the absence of any attorney.

3. At no time prior to making any such statement, confession, and/or admission did the defendant knowingly, intelligently or voluntarily waive his right to remain silent or his right to the assistance of counsel as provided by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

4. Any and all such statements, confessions and/or admissions were obtained by State Police officers and/or other public officials by the use of force, coercion, intimidation and/or duress in that the defendant was detained illegally and without probable cause for many hours, during all of such time the defendant was denied access to any friend or any attorney or any other person not involved in this interrogation, defendant during such time was transported against his will to various locations throughout the State of Connecticut and was thereby placed in great fear and caused to become confused and disoriented, the defendant was for long period of time deprived of proper sleep and nourishment, the defendant at

various times during his interrogation was subject to physical force applied against him by various police officers and was subjected to searches of his body in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution, the defendant's psychiatrist (a State employee) was utilized by the police to bring further pressure to bear upon the defendant to make such statements, the defendant was told by police officials that he would not be permitted to leave police custody until he made the statements desired by the police, the defendant was threatened verbally with physical violence if he did not confess, the defendant was promised immediate release if he did confess, and other methods of coercion were also brought to bear upon the defendant by the said State officials.

5. At the time he made said statements, confessions and/or admissions, the defendant was not of sound mind.

6. All such statements, confessions and admissions were obtained from the defendant in violation of his rights under the Fourth, Fifth, Sixth and Fourteenth

Amendments to the United States Constitution and under Article I of the Connecticut Constitution.

THE DEFENDANT

BY JOHN R. WILLIAMS
His Attorney

Filed September 21, 1977

O R D E R

The foregoing motion having been heard, it is hereby ORDERED: DENIED.

THE COURT

March 2, 1979 Wall, J.

APPENDIX F

MEMORANDUM ON DEFENDANT'S MOTION TO SUPPRESS CONFESSION, STATEMENTS AND ADMISSIONS

I

In the early morning hours of July 22, 1977, the police found nine bodies in the burnt out house of Frederick and Cheryl Beaudoin on Cedar Hill Drive in Prospect, Connecticut. The dead bodies were those of Mrs. Beaudoin, her seven children and an overnight guest, Jennifer Santoro. All the children had been beaten, Mrs. Beaudoin had been stabbed and some of the children were tied up with various bindings.

At approximately 9:30 a.m. on that same day the police went to 4 Glenridge Street in Waterbury, Connecticut, where the defendant, Lorne Acquin, was living with his girlfriend, Joyce Graham. The police asked the defendant to accompany them to the Meriden State Police Complex for questioning. After the defendant arrived at Meriden headquarters he was read a standard form Miranda card which he refused to initial. The police took a written statement from the defendant as to

his whereabouts on the night of July 21, 1977, which the defendant refused to sign. The defendant also refused to take a polygraph test.

At about 1:30 p.m., the defendant left Meriden with the police to go home to Waterbury. One police officer was dropped off at the State Police Command Post at the Prospect Town Hall, and the police cruiser continued along Route 69 toward Waterbury. While they were driving an order came over the police radio to bring the defendant to Bethany Troop 1. The defendant stated that he didn't want to go and while the cruiser was still moving, he opened the car door. The defendant got out of the car and started walking on Route 69 toward Waterbury. Other police came to the scene and the defendant was brought back to the police car and then to the Prospect Command Post.

The defendant was again advised of his Miranda rights after he arrived at Prospect and again he refused to sign the card. He was questioned as to his activities for the previous three days and a second written statement was prepared. At

approximately 5:45 p.m., the defendant, in the midst of the interrogation, asked to see a lawyer. The police captain who was with the defendant at the time asked him who he wanted and whether he had anyone in particular in mind. The defendant said that there wasn't an attorney that he wanted or trusted. Instead the defendant requested that he be allowed to see a Dr. Joel Albert, who was a state psychiatrist.

The defendant was brought by the police to the Troop I State Police Barracks at Bethany, at his request, to await the arrival of Dr. Albert. The defendant was read his Miranda rights shortly after he arrived at the barracks. Dr. Albert arrived at Bethany at about 11:45 p.m. and went to see the defendant. Soon after, the defendant, in the presence of Dr. Albert and the police, gave an oral confession. Before a written statement was taken the defendant was again read his Miranda rights, which he refused to sign. After the confession was typed up, the defendant signed it and initialed each page. The defendant also signed some consent forms.

After giving this written confession the defendant was arrested on nine counts of murder and arson.

In a motion filed with this court on September 21, 1977, the defendant moves to suppress any and all statements, confessions and/or admissions made by him to any official of the State of Connecticut or any of its subdivisions, on July 22, 1977, or at any time thereafter. The defendant maintains three separate grounds for his motion: (1) defendant's confession was fatally tainted by his unconstitutional detention, (2) defendant did not waive his fifth and sixth amendment rights to remain silent and to have the assistance of counsel, and (3) defendant's confession was not voluntary. Each issue will be addressed in turn.

II

The defendant contends in part II of his brief that he was arrested during the morning of July 22, 1977, that the arrest was without a warrant and without probable cause. It should be mentioned that the defendant was not formally arrested until after he made the confession, when he had

been in custody approximately twenty hours.

The defendant claims that the time of the warrantless arrest was around 9:30 a. m. on the morning of July 22, when he was picked up for questioning at his house in Waterbury. The defendant states that probable cause for the arrest must be determined as of that time, and that the objective facts fail to establish probable cause. Assuming the detention was illegal, any statements or confessions obtained after such detention should be excluded, citing Wong Sun v. United States, 371 U.S. 471 (1963), 83 S.Ct. 407, 9 L.Ed.2d 441.

However, Wong Sun does not stand for the proposition that any confession made in the course of, or following, an illegal detention, whether or not preceded by, or incidental to, an illegal arrest, is per se inadmissible as a matter of law. State v. Traub, 151 Conn. 246, 249. Even assuming the detention in this case was illegal, a confession made during such detention can be admitted if the state proves that (1) the confession was truly voluntary and

(2) the confession was not caused or brought about by, or the fruit of, the illegal detention. State v. Traub, supra, 250. The question of whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. Brown v. Illinois, 442 U.S. 590, 603 (1975), 95 S.Ct. 2254, 45 L.Ed.2d 416. In Brown the court states (pp. 603-604) that the factors to be considered in determining whether the confession is obtained as a result of an illegal arrest include: (1) Miranda warnings, (2) temporal proximity of the arrest and the confession, (3) presence of intervening circumstances, and (4) purpose and flagrancy of the official misconduct.

Assuming for the purposes of argument that the detention of the defendant was illegal, an examination of the facts shows that the defendant's detention was not an operative factor in bringing about the confession. As to the first factor, the defendant was given numerous Miranda warnings while he was in police custody. The first warnings were given after the de-

fendant arrived at the Meriden State Police Complex, at approximately 10:30 A.M. on June [sic] 22, 1977. As to the second factor of temporal proximity of the arrest and the confession, assuming that the arrest took place when the defendant was first picked up, almost fourteen hours separated the arrest and the confession. The cases cited in defendant's brief, where courts relied on Wong Sun to exclude confessions made after extended periods of detention, involved detentions which ranged from twenty-nine to sixty-eight hours before the confession. (Defendant's brief, p. 126.) Concerning the third and fourth factors there was no official misconduct during the defendant's detention. No force was used upon him nor were any threats, promises or offers made to him. The defendant was not abused physically or mentally. He was not physically restrained in any way.

Assuming the detention was illegal and without probable cause, there was no evidence submitted that such detention was an operative factor in causing or bringing about the confession.

III

The second issue which defendant raises in his motion to suppress is that he did not waive his fifth and sixth amendment rights to remain silent and to have the assistance of counsel during police interrogation. It is not disputed that the defendant received several Miranda warnings while he was with the police at Meriden, Prospect, and Bethany and before he gave his written confession. The question is whether the defendant waived his Miranda rights when he gave his confession.

Miranda deals with the admissibility of statements obtained from a person who is under custodial police interrogation and the necessity for procedural safeguards to prevent a person from incriminating himself. Miranda v. Arizona, 384 U.S. 436, 439 (1966), 86 S.Ct. 1602, 16 L.Ed.2d 694. Custodial interrogation, for Miranda purposes, means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (p. 444)

Miranda is quite explicit about the procedural safeguards to be employed during such custodial interrogation:

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the proseuction at trial, no evidence obtained as a result of interrogation can be used against him." (p. 479)

The defendant conceded in his brief that the police read him his Miranda rights at least five times before he gave his written confession. (Defendant's brief, p. 138.) The Miranda requirement that the defendant be given a full and effective warning of his rights at the outset of the interrogation process appears to be satisfied.

The next question is whether the defendant "voluntarily, knowingly and intelligently" waived his rights. The state has a "heavy burden" of demonstrating that the suspect's constitutional rights have been respected. State v. Darwin, 29 Conn. Sup. 423, 432. Waiver has been defined as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbat [sic], 304 U.S. 458, 464 (1938), 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466. This standard is applied to an in-custody interrogation. Miranda, supra, 475.

The defendant asserts that because he refused to initial the Miranda warning cards, he could not waive his rights to remain silent and to have counsel. How-

ever, defendant's refusal to sign an acknowledgment of the Miranda warnings given to him does not preclude finding an effective waiver of his rights. United States v. McNeil, 433 F.2d 1109, 1113 (1969).

The defendant correctly points out that his request at 5:45 p.m. on July 22, 1977, to see an attorney is particularly significant under the case law (defendant's brief, p. 134) for under Miranda, "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (p. 474) We must look closely at the facts as brought out at the hearing on this motion to suppress to determine whether the defendant waived his right to counsel. At approximately 5:45 p.m., when the defendant was at the Prospect Command Post, Trooper Hamila who had been with the defendant, came out of the storage room to speak to Captain McDonnell. The testimony of Captain McDonnell follows:

"Q Do you recall at somewhere around six o'clock Trooper Hamila coming out of the storage room to you?

A Yes.

Q You recall where--what it is he said to you?

A Yes. He came over to me. I was out on the larger--larger room and then he said that Acquin has asked to--asked for an attorney.

Q What did you say to Hamila?

A I told Hamila to go ahead and eat, that I would go in and talk with Lorne Acquin.

Q What, if anything, did Hamila do?

A I am not-- I don't know of my own knowledge what he did. He left. I went in the room. And, he--

Q He left?

A He left my presence. So--I know he was hungry and he was talking about eating for quite a few hours. So, that is the reason I told him to go eat.

Q Did he mention anything to Acquin about eating in your presence during that afternoon?

A Yes, on at least two or more occasions while I was in the room Trooper Hamila asked Lorne Acquin if he wanted anything to eat. And, Acquin said: no, he didn't, he didn't want to eat.

Q All right. Now, it was in the vicinity of six o'clock when you talked to Trooper Hamila regarding this lawyer; is that right?

A That's right.

Q And, he left. What did you do?

A I went in the room with Lorne Acquin and shut the door. And, it was just he and I in the room at that time.

Q When you entered the room was there anybody else there besides Acquin?

A No.

Q What, if anything, did you say to Acquin?

A I told him that: Trooper Hamila told me that you want an attorney.

Q What did he say?

A He said: yes, he did.

Q And, then what did you say?

A I asked him who he wanted. And, there were very long pauses before he would respond to my questions. And, then he said he didn't know; asked him: did he have anyone in particular in mind. He said no. I asked him: how about the attorney that you had the last time. And, he told me that he didn't trust that attorney and he didn't want him. I asked him--told him that: was there anybody else, another attorney. He said no, there wasn't another attorney that he wanted or trusted. I asked-- Then I told him: if he couldn't pick an attorney that I

would make calls and get a public defender or the state would provide an attorney for him. And, he replied to that that he didn't want the attorney that we--that I would call. He said: it would be just like talking to another cop. He didn't want any attorney that we choose. I then asked him about his family. I told him: I was pretty sure that his brother was in the building someplace, although I hadn't seen his brother, could his brother get an attorney for him.

Q What did he say?

A He said no. He didn't want his brother to get involved. He didn't want his brother to even know he was in the building or he didn't want his brother to know that he was involved here in the building with us.

Q Then what happened?

A Then we continued to talk about how would we find him an attorney, how would we get an attorney for him. And, he said that he--it wasn't really an attorney that he wanted, it was just somebody that he could trust. He wanted to sit and have somebody sitting with us that he trusted before he had any further conversation. And I asked him who that, you know--is there such a person, who can we get for you. And, he suggested a Dr. Albert, who I was not familiar with and didn't know who he was. And, I asked who he was and how he knew him. And, he told me that he knew him from the New Haven Jail and

he thought he was employed at the New Haven Jail.

About that time I went out to Lieutenant Shay and I told Lieutenant Shay that he wanted a Dr. Albert and to get a hold of Dr. Albert and have him come to the command center where we were.

Q Did you ask Acquin whether or not Dr. Albert was a lawyer?

A Yes, I did. And, he said that he knew he was a-- I think he was referring to him by a slang expression. He was calling him either a shrink or a head doctor or something like that, but wasn't sure whether or not he was an attorney. And, I told him that, you know, that Dr. Albert couldn't play the part of an attorney if, in fact, he wasn't an attorney. And, Acquin just kept saying that he wasn't really concerned about that, what he wanted was somebody to sit in that he could trust and be with him.

Q Did he say he trust Dr. Albert?

A He said he trusted a Dr. Albert very, very much. In fact, he said that, while this conversation was going on, that he had told me and Dr. Albert some things that we were the only two he had ever told, he hadn't even told some of his family members.

Q And, how long did this conversation go on?

A Well, from the time I went in the room until I came out and told Shay-- I would say from a half to three quarters of an hour or so."

Later in his testimony Captain McDonnell stated that from the time he had the conversation with the defendant regarding a lawyer and the time Dr. Albert arrived at Bethany Barracks at approximately 11:40 p.m., he had had no conversation with the defendant regarding the deaths in Prospect. After Dr. Albert arrived the defendant wanted the police to ask him questions and then he gave a detailed confession.

Once the defendant indicated a desire to obtain counsel, the police correctly stopped their interrogation concerning the deaths. However, the defendant's request for counsel was indecisive and under the circumstances Captain McDonnell was correct in making an inquiry into whether the suspect did or did not want counsel present. Nash v. Estelle, 530 F.2d 652, 658 (5th Cir. 1977). (Rehearing en banc same Decision 6/21/79.) The suspect's wishes can be explored to determine exactly what he wants. Nash, supra, 656.

The Miranda court cited Federal Bureau of Investigation (FBI) practice as consistent with Miranda procedure:

> "When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, Shultz v. U.S., 351 F.2d 287 (1965). It may be continued, however, as to all matters other than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent." (p. 485)

Based upon the evidence presented at the hearing on the motion to suppress, the court is convinced that the state has met its burden of showing that the defendant "knowingly and intelligently" waived his right to counsel. Although the defendant had an opportunity to retain counsel, he opted instead for the presence of Dr.

Albert, "somebody that he could trust." The police told the defendant that the state would provide an attorney for him and that the police would call any attorney that he wanted. The police also asked the defendant whether he wanted his brother to get an attorney for him. The defendant said that it wasn't really an attorney that he wanted, just somebody that he could trust to be with him before he had any further conversation. It was the defendant, not the police, who suggested that Dr. Albert be brought to the barracks.

In a very similar case, Cobbs v. Robinson, 528 F.2d 1331 (2d Cir. 1975), the Second Circuit upheld the decision of the Connecticut Supreme Court in State v. Cobbs, 164 Conn. 402. In Cobbs, after the defendant indicated that he should call an attorney, he was given free use of a telephone and no attempt was made to interrogate him. The defendant made several calls including one to his grandmother. When the grandmother arrived at the police station, the defendant spoke with her and then made a full statement

to the police. (pp. 419-420) The court concluded that "an accused who requests counsel may thereafter voluntarily waive his right to counsel provided he has had in the interim a full opportunity to obtain counsel or to have an attorney appointed for him. The police may conduct an interrogation when such a knowing, intelligent and voluntary election to proceed without an attorney has been manifested by the defendant." (p. 420) The defendant in Cobbs made it clear through his words and actions and failure to make further mention of counsel that he had abandoned any intention of getting or consulting an attorney.

Likewise, in the present case, the defendant was provided a full opportunity to obtain counsel or to have counsel appointed for him. Instead he requested that he be able to see his psychiatrist, Dr. Albert. After speaking to his psychiatrist the defendant voluntarily waived his request for counsel. He also at no time expressed a desire to remain silent. It is an inescapable conclusion that Lorne Acquin knowingly and intelligently waived his fifth and sixth amendment rights to

remain silent and to have counsel during the interrogation.

IV

The third issue which the defendant raises in his motion to suppress is that defendant's confession was not voluntarily and therefore is excludable.

First, it should be mentioned that the state has the burden of proving by a fair preponderance of the evidence that the defendant's confession was voluntary. The Connecticut Supreme Court in the recent case of State v. Staples, Conn. (40 Conn. L.J., No. 2, p. 19) (1978) held that "a trial court should follow the preponderance of the evidence standard and not the reasonable doubt standard in determining whether or not the state has sustained its burden of proving voluntariness when a confession of a . . . defendant is offered into evidence." (p. 21)

Both sides used expert psychiatric testimony regarding the defendant's mental ability to make a voluntary confession at the suppression hearing. This is consistent with the case of People v. Parks, 579

P.2d 76 (Colo. 1978), where the court held that expert psychiatric testimony regarding the defendant's mental ability to make free and intelligent decisions at the time of his or her arrest is generally relevant to the issues before the court. The expert testimony offered by the state at the suppression hearing is supportive of the conclusion by the court that the defendant's confession was voluntary.

The Staples case is helpful in elucidating the factors which determine voluntariness:

> "The circumstances which enter into such a determination are many. The facts in each case must be closely scrutinized. Gallegos v. State of Colorado, 370 U.S. 49, 52, 82 S.Ct. 1209, 8 L.Ed.2d 325. '[T]he test of voluntariness is whether an examination of all the circumstances discloses that the conduct of 'law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confes-

sions, not freely self-determined. . . .' Rogers v. Richmond, 365 U.S. 534, 544, [81 S. Ct. 735, 5 L.Ed.2d 760] (1961) . . . .' 'Put another way, the confession must be the product of an essentially free and unconstrained choice by the maker.' State v. Devine, 149 Conn. 640, 653, 183 A.2d 612, citing Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed. 2d 1037."

It is the opinion of the court that the evidence at the hearing on the motion to suppress showed that the defendant's confession was spontaneous and voluntary. No physical force of threats were used on the defendant nor were any promises made. He was not physically restrained in any way. There were not more than three policemen with the defendant at any one time. The defendant was not denied any requests for food or drink. He was not under the influence of alcohol or drugs. He signed the written confession and initialed each page.

The state has sustained its burden of proving that defendant's confession was voluntary by a fair preponderance of the evidence. The conduct of the police officers in this case was not such as to "overbear the defendant's will to resist." The confession was the product of an essentially free and unconstrained choice by the defendant.

For the foregoing reasons, the defendant's motion to suppress confession, statements and admissions is hereby denied.

WALL, J.

March 2, 1979

APPENDIX G

PORTIONS OF TRANSCRIPT OF TAPE RECORDED INTERROGATION OF LORNE ACQUIN BY TROOPERS BLAIS, HAMILA AND ZDANOWICZ AT CONNECTICUT STATE POLICE HEADQUARTERS, MERIDEN, JULY 22, 1977, BEGINNING APPROXIMATELY 10:30 A.M.

(Suppression Hearing Exhibit A-1, supplemented by Suppression Hearing testimony of Troopers Hamila and Zdanowicz.)

(Inaudible)

BLAIS: Listen I mean they're gonna replace me so that I can go to the hospital with my wife. All Lt. Shay wants is simply a breakdown in communications as to your coming here. Its just, ah, you tell us what you did with the family last night and how, ah, all their actions and what time, who was at the house when you left.

ACQUIN: Yeah, what time? [9/11/78 Tr., Hamila, p. 18]

BLAIS: There may be a problem with identification as to who was in the house because of the...burning you know. So we'd like a statement from you as to the facts and circumstances.

(Inaudible)

BLAIS: No not completely it's (inaudible), we don't know how bad the bodies are maybe some are worse than others I don't know.

ACQUIN: (Inaudible) suffer (inaudible). [Id. p. 19]
BLAIS: No, they didn't tell me.
UM: (Inaudible)
BLAIS: Yeah.

(Inaudible)

BLAIS: Now what we should do is, um, is to talk over the whole thing first and then, ah, it'll be like a statement from you to the best of your knowledge as to who they were and what occurred, alright? George, you want to take a statement because I'm gonna leave as soon as the replacement....
HAMILA: (Inaudible) Well how many, like down here?
BLAIS: (Inaudible)
HAMILA: You don't know who they're sending up?
BLAIS: No. They didn't tell me.
HAMILA: (Inaudible)
BLAIS: I have no idea.
HAMILA: Who did you talk to?
BLAIS: Lt. Shay. Um, ... statement paper here.
ACQUIN: Well I'm not sure....
BLAIS: Well, let's start from the beginning, um, as everything you can tell us. Did you work yesterday?
ACQUIN: No.
BLAIS: ... find some statement paper.

(Telephone rings.) [Id. p. 21]

BLAIS: I can't find any statement paper.
ACQUIN: (Inaudible)
BLAIS: Pardon?
ACQUIN: (Inaudible) Do you know where... is?
BLAIS: No, he left.

BLAIS: Okay, just wnat to get you out of here as soon as possible so we'll start. Do you realize that any time you talk to anybody you have to read them their rights. Just you know, I'm sure you've been through this before, we just have to read you the rights, alright? The Constitution requires that I inform you of your rights. You have the right to remain silent. If you talk to any police officer anything you say can, will be used against you in court. You have a right to consult with a lawyer before you are questioned and may have him with you during questioning. If you cannot afford a lawyer one will be appointed... questioning. If you wish to answer questions you have the right to stop answering at any time. You may stop answering questions at any time you wish to talk to a lawyer and may have him with you during any further questioning. What's the date today, the 22nd?

HAMILA: 7-22-77, 1045.

BLAIS: Just want to put your initials on this please.

ACQUIN: What's all this...?

BLAIS: It's just acknowledging that I read those rights to you.

ACQUIN: It says you are going to take me to court. [Id. p. 22]

BLAIS: No, no, no, no. I'm not taking this into court. It doesn't say that, I didn't say that to you.

ACQUIN: It says here that anything I say can be used against me. [Id. p. 23]

BLAIS: No, ... See we have to tell this. We don't know what you're gonna tell us. See we have to tell, we have to advise you of your Constitutional rights.
ACQUIN: For what? [Id. p. 23]
BLAIS: Because of the importance..., no.
ACQUIN: (Inaudible)
BLAIS: Because we're interviewing you. We're just interviewing you. See, I won't be talking to anybody. We have to advise you of your rights. [Id. pp. 24-25]
ACQUIN: (Inaudible)
BLAIS: You've never been advised of your rights before?
ACQUIN: Only when I was arrested. [Id. p. 25]
BLAIS: You're not arrested.
HAMILA: (Inaudible)
ACQUIN: (Inaudible)
BLAIS: Lt. Shay told me to talk to him and find out if he can shed any light on, help us by telling us what happened yesterday. Tell us about the family. Anybody that disliked them or anything. What might have caused the fire?
ACQUIN: (Inaudible)
BLAIS: You don't want to sign it?
ACQUIN: No, I don't want to sign it. [Id. p. 26]
BLAIS: Alright.
ACQUIN: (Inaudible)
BLAIS: (Inaudible) I'm being very honest with you. That's why I'm advising you of your rights. (Inaudible)
ACQUIN: (Inaudible) It sounds to me like I'm being arrested. [Id. p. 27]
BLAIS: No, we're not arresting you.
ACQUIN: (Inaudible)

ZDANOWICZ: You were jumped from the rear, right?
ACQUIN: (Inaudible)
ZDANOWICZ: What happened?
ACQUIN: (Inaudible) Choke hold...I got out of it....Kicked in the side.... [Id. pp. 26-27]
ZDANOWICZ: Okay, ah, about that time somebody kicked you in the side, right?
ACQUIN: (Inaudible) The other side of the gas station. (Inaudible)
ZDANOWICZ: Okay, now you've already told us that, Lorne. You got out of the hold and at that time somebody kicked me in the side and I went down, right? Did you hit the pavement, did you hit the dirt...?
ACQUIN: I hit the ground....
ZDANOWICZ: Where are you hurt? [Id. p. 27]
ACQUIN: (Inaudible)
ZDANOWICZ: Your right arm?
ACQUIN: (Inaudible)
ZDANOWICZ: What's that mark inside? No, no, inside your arm looks like black and blue.
ACQUIN: (Inaudible)
ZDANOWICZ: How did you get the bruises all over your eye?
ACQUIN: This one here?
ZDANOWICZ: Yeah.
ACQUIN: I got it..., (inaudible).
ZDANOWICZ: Yeah, but those over your right eye and your eye lid actually, would you call it an eye lid or an eyebrow?
ACQUIN: Eye lid....
ZDANOWICZ: You said you got some on the other side...?

ACQUIN: (Inaudible)
ZDANOWICZ: Okay, what did you lose in the place?
ACQUIN: Wallet.
ZDANOWICZ: What else?
ACQUIN: I'm pretty sure the registration to the car. I'm not sure. I looked for it, I couldn't find it. [Id. p. 28]
ZDANOWICZ: Well before I do that, were you hurt at all other than that, did you get a bruise on your other side? [Ibid.]
ACQUIN: No.
ZDANOWICZ: Can I see?

(Inaudible)

ZDANOWICZ: Stand up. (Inaudible) Busted rib and never know it.... [Id. p. 29]
ACQUIN: No.
ZDANOWICZ: Let's take a look. Over here. Yeah, turn around.

(Inaudible)

ZDANOWICZ: You sure you're alright?
ACQUIN: Oh yeah.
ZDANOWICZ: There's no shortness of breath? No pain in your side?
ZDANOWICZ: Did you report this to the police?
ACQUIN: No.
ZDANOWICZ: Why not? Did you tell anybody about it?
ACQUIN: I told my old lady. [Id. pp. 29-30]
ZDANOWICZ: What time?
ACQUIN: (Inaudible)
ZDANOWICZ: Did she say to tell the police?
ACQUIN: I told her to ... got to work .... (inaudible) [Id. pp. 29-30]

ZDANOWICZ: And what time was that?
ACQUIN: ... go to work at six o'clock. Quarter after six. [Id. pp. 31-32] (Inaudible)
ZDANOWICZ: So on the way to the diner you told her to notify the police?
ACQUIN: Before then I told her (inaudible)
ZDANOWICZ: Are these the clothes you were wearing when you were (inaudible)?
ACQUIN: (Inaudible)
ZDANOWICZ: What were you wearing when you were assaulted?
ACQUIN: I had my good jeans on and, um, white T-shirt (inaudible) [Id. p. 33]
ZDANOWICZ: That's an easy mark with a white T-shirt....
ACQUIN: (Inaudible)
ZDANOWICZ: White T-shirt....
ACQUIN: (Inaudible)
ZDANOWICZ: (Inaudible)
ACQUIN: (Inaudible)
ZDANOWICZ: Okay, you were wearing a white T-shirt, what kind of pants?
ACQUIN: They're like these but they're a little more dressier. They've got patches on them.
ZDANOWICZ: Were they...? I mean...?
ACQUIN: No, (Inaudible).
ZDANOWICZ: What were you wearing for footwear?
ACQUIN: My brother's army boots.
ZDANOWICZ: Steve's?
ACQUIN: No, Pat's.
ZDANOWICZ: What were you wearing them for on a hot day like that? [Id. pp. 34-35]
ACQUIN: (Inaudible)

ZDANOWICZ: That's it -- no sweater, no belt, no...?
ACQUIN: The belt I had....
ZDANOWICZ: Where is the belt now?
ACQUIN: (Inaudible)
ZDANOWICZ: Okay, here...were you wearing socks by the way?
ACQUIN: (Inaudible)
ZDANOWICZ: Did you change socks?
ACQUIN: No, they didn't smell. [Id. pp. 35-36]
ZDANOWICZ: Okay, ... don't you sweat?
ACQUIN: (Inaudible)
ZDANOWICZ: Okay, the kid that ripped you off, how many were there.
ACQUIN: I'd say about three. [Id. p. 36]
ZDANOWICZ: Three?
ACQUIN: I seen about three. Maybe one I know. (Inaudible)
ZDANOWICZ: Okay, you may...right?
ACQUIN: (Inaudible)

(Inaudible)

ZDANOWICZ: How come you know? (Inaudible)
ACQUIN: (Inaudible)
ZDANOWICZ: Did you chase them or were you hurt?
ACQUIN: By the time I got up, they were gone. [Id. p. 37]
ZDANOWICZ: Oh. (Inaudible)
ACQUIN: (inaudible)
ZDANOWICZ: I can't see anybody ripping you off, Chief, believe me. [Id. p. 37]
ACQUIN: (Inaudible)
ZDANOWICZ: What's that?
ACQUIN: (Inaudible)

(Inaudible)

ZDANOWICZ: What time did you get home, Lorne?
ACQUIN: (Inaudible)
ZDANOWICZ: One-thirty, two o'clock?
ACQUIN: About that....
ZDANOWICZ: Your brother Steve and Joyce were in the house at the time? [Id. pp. 37-38]
ACQUIN: Not Steve...another guy Steve.
ZDANOWICZ: And what's his last name?
ACQUIN: (Inaudible) He's with, with Anna down at whatchacallit.
ZDANOWICZ: Is what?
ACQUIN: With Anna down at Mickey's.
ZDANOWICZ: Yeah. (Inaudible)
ACQUIN: He asked me if he could stay over; I said sure.
ZDANOWICZ: (inaudible)
ACQUIN: (Inaudible)
ZDANOWICZ: (Inaudible)
ACQUIN: Well we dropped Steve off (inaudible).
ZDANOWICZ: (Inaudible)
ACQUIN: (Inaudible)
ZDANOWICZ: Well where do you meet your boss?
ACQUIN: ...right up from Bill's Cafe, the diner right there...the package store there,.... [Id. pp. 38-39]
ZDANOWICZ: You can't read, can you, Chief? [Id. p. 39]
ACQUIN: A little.
HAMILA: You don't want to read all that.
ZDANOWICZ: Well I read fast, I read slow, I read good (inaudible). We'll go right through it so you'll understand, alright? I don't want to make any mistakes...if I make a mistake or error in

this statement...alright? (Inaudible)...or delete it or add to it...I want you....[Id. p. 40]

ACQUIN: (Inaudible) You want me.... [Ibid.]

ZDANOWICZ: What?

ACQUIN: (Inaudible)

ZDANOWICZ: (Inaudible) Those are your rights. This is.... [Ibid.]

ACQUIN: (Inaudible)

ZDANOWICZ: Well it's a usual police procedure that when we take to somebody during the course of an investigation it is their routine practice by the policeman to inform people of their Constitutional Rights...answering questions, giving statements, you could have an attorney, you're familiar...?

ACQUIN: I ain't signing it. [Id. p. 41]

ZDANOWICZ: Well I'm not gonna make you sign it if that's what you think....[Id. p. 42]

ACQUIN: (Inaudible)

ZDANOWICZ: Now this is strictly on your own volition.

ACQUIN: (Inaudible)

ZDANOWICZ: Alright? Want to read this all over again?

ACQUIN: (Inaudible)

ZDANOWICZ: (Inaudible)

ACQUIN: (Inaudible)

ZDANOWICZ: They were read to you?

ACQUIN: (Inaudible)

ZDANOWICZ: They were read to you?

ACQUIN: (Inaudible)

ZDANOWICZ: And you don't want to sign it now, do you?

ACQUIN: No, because I don't agree with what it says. I don't like what it says.

ZDANOWICZ: What does it say?

ACQUIN: It says, anything I say can be used against me in a court of law. What are you going to court for?

ZDANOWICZ: No..., well are you familiar with the system at all, the judicial system which you must be because you've been there so many times?

ACQUIN: (Inaudible)

ZDANOWICZ: You've been there when they arraign you and the judge arraigns.... [Id. p. 42]

ACQUIN: Yes, ...

ZDANOWICZ: Yeah, well the courts also... talk to people they always... have to read people their rights in a situation. That they could add information or be accused of or whatever the situation may be. So b law we are required to inform a subject of his rights and this is what we're doing. In other words for them, they say they sat here and chatted with you and they warned you of your rights and they gave you this blue card which has all your rights. If you wish to sign it you can but don't if you don't have to. And they do prepare you of your rights because they have to by law. (Inaudible) I'm not giving any...statement today, I want you to fully understand what

the situation is.

ACQUIN: I understand.

ZDANOWICZ: You understand?

ACQUIN: I understand.

ZDANOWICZ: And you...?

ACQUIN: (Inaudible)

ZDANOWICZ: Okay, that's your prerogative and I'm not going to try to change it.

ACQUIN: Right.

ZDANOWICZ: Okay, so I Lorne Acquin, age 27 of 4 Glenwood Street, Waterbury, Connecticut, make the following truthful statement without fear, threat or promise....

ACQUIN: (Inaudible)

ZDANOWICZ: What?

ACQUIN: Glenridge.

ZDANOWICZ: Glenridge. Knowing that it can be used against me, (inaudible) right?

ACQUIN: (Inaudible)

HAMILA: You want that out?

ZDANOWICZ: Yeah, you want me to cross that out?

ACQUIN: (Inaudible)

ZDANOWICZ: This is a preamble....

(At this point the tape ended.)

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No. 82-896

IN THE

Supreme Court of the United States

October Term, 1982

LORNE J. ACQUIN,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

On Writ of Certiorari to The Supreme Court of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petition for certiorari should be denied because the Connecticut Supreme Court's holding that the defendant waived his fifth amendment right to counsel before confessing is consistent with controlling decisions of this Court?

2. Whether the petition for certiorari should be denied because the Connecticut Supreme Court's holding that the defendant's confession was not obtained in violation of his fourth amendment rights is consistent with settled and controlling decisions of this Court?

3. Whether the petition for certiorari should be denied because the Connecticut Supreme Court's conclusion that the defendant's will to resist was not overborne by the conduct of the State Police is supported by the evidence and is consistent with controlling decisions of this Court?

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted in opposition to a petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on July 27, 1982.

STATEMENT OF THE CASE

I.

On the early morning of July 22, 1977, the police found nine bodies in the burn-out house of Fredrick Beaudoin at the corner of Cedar Hill Road and Route 68 in Prospect, Connecticut. Eight of the bodies were members of the Beaudoin family, Mrs. Cheryl Beaudoin and her seven small children, ages 4 to 12, and one body was that of Jennifer Santoro, age 6, an overnight guest. All of the children had been beaten, and some were tied up with various bindings. Mrs. Beaudoin had been stabbed. (T-6-11, 7/17/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 1f).

At about 9:30 a.m. on July 22, 1977, Troopers James Blais and George Hamila of the Connecticut State Police met the defendant, Lorne Acquin, in Waterbury, Connecticut, at the home of Joyce Graham, his girlfriend. (T-9-12, 7/5/78). The defendant was Mr. Beaudoin's foster brother and had once lived with the Beaudoin family as a state ward. (T-93-94, 7/14/78). The officers told the defendant about the fatal house fire and asked him to assist them in the investigation by coming with them. (T-11, 7/5/78). The defendant agreed to go with the officers. (T-14, 7/5/78; T-79-80, 7/11/78; T-85, 9/5/79 AM; T-7, 9/5/79 PM). He went with them and a co-worker, Bruce Bennett, first toward Prospect where Bennett was dropped off and then to the Meriden State Police Headquarters. (T-13-16, 7/5/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 1f).

At the Meriden headquarters, approximately one hour after the officers had first met the defendant on July 22, 1977, Trooper James Blais gave the defendant his first *Miranda* warnings. (T-20, 7/5/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 1f).

The second officer to advise Acquin of his constitutional rights was Detective Zdanowicz. The detective advised the defendant of his constitutional rights at Meriden shortly after he arrived there

at approximately 11:00 a.m. (T-45, 7/6/78). This warning, like many other parts of the conversation at Meriden, was recorded on tape. (State's Exhibit A for Suppression Hearing, T-90-91, 7/11/78). The tape recording reflects that the defendant was repeatedly assured he was not under arrest, and that nowhere there was he accused of the crimes. (State's Exhibit A for Suppression Hearing, T-90-91, 7/11/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 1f).

Detective Zdanowicz then took an oral statement from the defendant concerning his visit to the Beaudoin house and whereabouts that night. In that statement, Mr. Acquin stated that after visiting the Beaudoin residence, he went to a number of Waterbury bars on the night of July 21, 1977, using Joyce Graham's Rambler. He stated that the last place he visited was a bar on Watertown Avenue. He said that he stayed for awhile, left at about 1:00 a.m. and then drove around Waterbury for a short period of time until he went home. (T-47-48, 7/6/78). Nowhere in that original statement did the defendant mention anything about being mugged.

Thereafter, while Detective Zdanowicz was taking a written statement from Mr. Acquin, between 11:00 a.m. and 1:30 p.m., the detective asked Mr. Acquin how he had received the wounds on his face. (T-50, 7/6/78). The defendant claimed that he sustained his facial wounds, was kicked violently on the left side, and was knocked to the ground while being mugged as he left the last bar after 1:00 a.m. on July 22. (T-51, 7/6/78).

Mr. Acquin indicated that he had not notified the police about this assault and robbery. Mr. Acquin was asked by the detective if he could see his skin for bruises, contusion marks and abrasions. Detective Zdanowicz then examined Mr. Acquin's side and found no wounds, discoloration, abrasions, scratches, cuts, soreness or stiffness. He found nothing. (T-51-53, 7/6/78). A search of the records of the Waterbury Police Department also revealed that this alleged mugging was never reported. (T-37, 7/17/78). Detective Zdanowicz telephoned in, to his headquarters, the infor-

mation about Mr. Acquin's oral and written statements and the variance between the two statements, because he considered the omission of the mugging incident in the first statement to be a "fantastic oversight." (T-58-60, 7/6/78). The fact that Mr. Acquin's injuries did not go with a "mugging job," as he had described the mugging, caused Detective Zdanowicz, an experienced detective, to feel that Acquin was a suspect in this case. (T-123, 7/6/78).

Detective Zdanowicz wrote out the statement of Mr. Acquin, and after Mr. Acquin directed that Zdanowicz make a few changes, the statement was read to Mr. Acquin, word for word. (T-94, 95, 7/6/78).

After the statement was read to Mr. Acquin, Detective Zdanowicz asked Acquin to sign the statement, but he refused. (T-55, 7/6/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 1f-2f).

After the interview of Mr. Acquin was concluded in Meriden, Trooper George Hamila and Detective Zdanowicz, in Zdanowicz's car, proceeded to drive the defendant back home to Waterbury at about 1:30 p.m. (T-95, 7/11/78). Trooper Hamila was first to pick up his car where he had left it at the Beaudoin residence and then drive the defendant to Waterbury. Trooper Zdanowicz was then to proceed in his car to the Prospect Command Post. (T-95-96, 7/11/78). As they approached Route 69 and Summit Road in Prospect, however, Mr. Acquin said that he did not want to go to the Beaudoin residence. The defendant said that if the troopers were going there, they should let him out and he would either walk or take a cab to Waterbury. (T-96, 7/11/78). The defendant's protest was vehement that he did not want to pass the Beaudoin residence. (T-25, 7/17/78).

Trooper Hamila dropped off Zdanowicz at the Prospect Town Hall and then drove Zdanowicz's car north on Route 69 toward Waterbury to take the defendant, who was in the front seat, home. (T-98, 7/11/78).

About a quarter of a mile north of the Command Post, the defendant wanted some cigarettes, and Hamila stopped at a Cumberland Farms Store. Mr. Acquin left the car and went into the store. Trooper Hamila also followed him into the store where they both bought cigarettes. (T-98, 7/11/78). When they returned to the car and as they were driving towards Waterbury, Hamila received a radio message to bring the defendant to the Bethany State Police Barracks. (T-99, 7/11/78). When Hamila advised the radio dispatcher that he would call in, the same message was repeated. (T-99, 7/11/78). Mr. Acquin told Hamila, who had then turned the car south toward the Bethany Barracks, that he did not want to go to the barracks, and the defendant unlatched the car door while the car was moving. (T-99-100, 7/11/78). Hamila pulled the car to the shoulder to allow the defendant to leave the car and assured the defendant that they would go to the barracks to find out what was wanted, and then he would take the defendant home. (T-100, 7/11/78). Mr. Acquin, who had left the car, returned to the vehicle, but then left it again and started walking northerly on Route 69 toward Waterbury. (T-100, 7/11/78). Trooper Hamila reported this event to the radio dispatcher and followed the defendant up Route 69 in the cruiser. (T-101-02, 7/11/78).

Shortly after the defendant had alighted from the car, at approximately 2:00 p.m., Lt. Shay and other officers in two police cars travelled northerly on Route 69 from the Command Post. Lt. Shay got out of one of the vehicles, crossed the street and approached Mr. Acquin. (T-102, 7/11/78). When Lt. Shay first observed Mr. Acquin on Route 69 at about 2:00 p.m., he noticed that Mr. Acquin had scratches on his face and what appeared to be a burn mark on his right eyelid. He also noticed a mark on his left wrist that also looked like a burn mark. (T-16, 7/17/78). Lt. Shay then asked Mr. Acquin if he were Lorne Acquin and asked, "Do you want to help us with this case?" Mr. Acquin replied, "Yes," and with that Lt. Shay walked with Mr. Acquin back to Hamila's car. Lt. Shay had his hand on Mr.

Acquin's shoulder as they walked to Trooper Hamila's car. (T-103-04, 7/11/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 2f).

II.

Lt. Shay had received the following information prior to his first meeting Mr. Acquin on Route 69 (T-18, 7/17/78):

The first piece of information Lt. Shay received was that the defendant, Lorne Acquin, had been a visitor at the Beaudoin home on the night of July 21, 1977. (T-13, 7/17/78). He also was told by Sgt. Joseph Dynderski that the defendant had a reputation for violence and that he had escaped on one occasion from the State Police. He was also told that the defendant had a long and serious criminal record. (T-13, 7/17/78).

Prior to receiving this information, Lt. Shay had viewed the crime scene and the victims, each of whom had died as the result of extreme violence. (T-6-11, 7/17/78).

Lt. Shay received further information from Rose Ann Paolino, a neighbor of the Beaudoin's, who said that at about 7:30 p.m. on Thursday, July 21, she had heard the Beaudoin children shouting the name "Uncle Lorne." (T-19, 7/17/78).

Lt. Shay learned from Donna Paolino, another neighbor of the Beaudoin's, that she had seen a black car, about the size of a Rambler, parked at the Beaudoin home at about 10:00 p.m. on the night of July 21. She said further that she had seen this car parked at the Beaudoin home several weeks earlier when Lorne Acquin was visiting the Beaudoin home. (T-19-20, 7/17/78).

Mrs. Frances Paolino, Donna Paolino's mother, told Lt. Shay that at about 8:30 p.m. on July 21, 1977, she had seen a black Rambler drive up Cedar Hill past her home and then come back down the street. She related that the driver matched Mr. Acquin's description. (T-18, 20, 7/17/78).

Mrs. Paolino also told Lt. Shay that at about 3:45 a.m., on July 22, she was awakened by the strong smell of smoke. She stated further that she looked out her living room window toward the Beaudoin home. At this time, she observed a dark colored car drive up Cedar Hill Road at a high rate of speed and then come back down the street at a high rate of speed. She also said that the car tail lights went on as the car passed her house. Shortly thereafter, she called the fire department to report the Beaudoin house fire. (T-20-21, 7/17/78).

Lt. Shay was told by Raymond Caruso that he had seen Lorne Acquin drive a dark colored Rambler past his house to the end of Cedar Hill Road (a dead-end street) and then drive back down Cedar Hill Road at about 8:30 p.m. on July 21. He also told Lt. Shay that he had seen Lorne Acquin driving the car down Cedar Hill Road past his house at about 9:45 p.m. that same evening. (T-21-22, 7/17/78).

Caruso further told Lt. Shay that he was aware that Lorne Acquin had been involved in an arson case and had a very serious criminal record. (T-22, 7/17/78).

From Janice Blake, another neighbor, Lt. Shay learned that Michael, her son, had informed her that Lorne Acquin had driven up to the Beaudoin house at about 8:00 p.m. on July 21. Michael also told his mother that Fred Beaudoin, Jr., age eleven, had also informed him that Lorne Acquin was going to spend that night at the Beaudoin residence; that is, Mr. Acquin was going to be there from July 21 through July 22 as an overnight visitor. (T-22-23, 7/17/78).

Frank Bainer reported to the State Police that he had recently overheard Mr. Acquin bragging that he had killed five or six people in Detroit, Michigan. Bainer also stated that one Pat Walsh had seen Lorne Acquin, between 8:00 and 9:30 p.m. on July 21, at St. Anthony's Church parking lot at Prospect center, not far from the murder scene. (T-23, 7/17/78).

Barbara Olander had told the lieutenant that Lorne Acquin once lived with the Fred Beaudoin family. She added that while Acquin lived there, the house caught on fire. (T-23, 7/17/78).

From Fredrick Beaudoin, Sr., husband of Cheryl Beaudoin and father of seven of the nine victims, Lt. Shay learned that Cheryl Beaudoin had not told her husband that Mr. Acquin was a visitor at the house on the evening of July 21. Lt. Shay was suspicious that there was probably some reason why she did not tell her husband that Mr. Acquin was visiting at the home. (T-24, 7/17/78). Mr. Beaudoin had gone to work at Pratt & Whitney that evening about 11:00 p.m. and was to return home the next morning. (T-3-5, 7/18/78).

Trooper James Blais told Lt. Shay that when he met Mr. Acquin in Waterbury at about 9:30 a.m. on July 22 and told him that his foster relations were dead, Mr. Acquin showed no surprise or emotion. (T-24-25, 7/17/78).

From Detective Joseph Zdanowicz, who replaced Blais at Meriden, Lt. Shay learned that Acquin was all marked up, having fresh scratches on his face. He also knew that Mr. Acquin had told Detective Zdanowicz that he received the scratches when he was mugged in Waterbury on the night of July 21-22, 1977. (T-25, 7/17/78).

III.

The third officer to advise the defendant of his constitutional rights was Trooper George Hamila. He advised Acquin of his rights at the Town Hall in Prospect, the Command Post, shortly after 2:00 p.m. on Friday, July 22, 1977, when he interviewed him as to his whereabouts on July 21 through July 22. (T-108, 116-18, 7/11/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 2f).

While being interviewed at Prospect after being advised of his *Miranda* rights, and while a second written statement as to his whereabouts on July 21 and 22 was being prepared (T-119,

7/11/78), the defendant told the police that he was in trouble and that he wished to see an attorney. (T-7, 7/12/78). After being asked by Captain McDonnell which attorney he wanted and whether he wished his brother to obtain an attorney, the defendant stated he would only trust Dr. Albert who had been the jail psychiatrist when the defendant had previously been in custody in other cases. (T-74-76, 7/18/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 2f-3f).

The following occurred:

> A. (By Captain McDonnell) I asked him who he wanted. And there were very long pauses before he would respond to my questions. And, then he said he didn't know: asked him: did he have anyone in particular in mind. He said no. I asked him: how about the attorney that you had last time. And, he told me that he didn't trust that attorney and he didn't want him. I asked him—told him that: was there anybody else, another attorney. He said no, there wasn't another attorney that he wanted or trusted. I asked—Then I told him: if he couldn't pick an attorney that I would make calls and get a public defender or the state would provide an attorney for him. And, he replied to that that he didn't want the attorney that we—that I would call. He said: it would be just like talking to another cop. He didn't want any attorney that we choose. I then asked him about his family. I told him: I was pretty sure that his brother was in the building someplace, although I hadn't seen his brother, could his brother get an attorney for him.
>
> Q. What did he say?
>
> A. He said no. He didn't want his brother to get involved. He didn't want his brother to even know he was in the building or he didn't want his brother to know that he was involved here in the building with us.

Q. Then what happened?

A. Then we continued to talk about how would we find him an attorney, how would we get an attorney for him. And, he said that he—it wasn't really an attorney that he wanted, it was just somebody that he could trust. He wanted to sit and have somebody sitting with us that he trusted before he had any further conversation. And, I asked him who that, you know—is there such a person, who can we get for you. And, he suggested a Dr. Albert, who I was not familiar with and didn't know who he was. And, I asked who he was and how he knew him. And, he told me that he knew him from the New Haven Jail and he thought he was employed at the New Haven Jail.

About that time I went out to Lieutenant Shay and I told Lieutenant Shay that he wanted a Dr. Albert and to get a hold of Dr. Albert and have him come to the command center where we were.

Q. Did you ask Acquin whether or not Dr. Albert was a lawyer?

A. Yes, I did. And, he said that he knew he was a—I think he was referring to him by a slang expression. He was calling him either a shrink or a head doctor or something like that, but wasn't sure whether or not he was an attorney. And, I told him that, you know, that Dr. Albert couldn't play the part of an attorney if, in fact, he wasn't an attorney. And, Acquin just kept saying that he wasn't really concerned about that, what he wanted was somebody to sit in that he could trust and be with him.

Q. Did he say he trust Dr. Albert?

A. He said he trusted a Dr. Albert very, very much. In fact, he said that, while this conversation was going

> on, that he had told me and Dr. Albert some things that we were the only two he had ever told, he hadn't even told some of his family members.

(Trial Court Memorandum of Decision, Petitioner's App. F at 11f-15f).

The police respected the defendant's wishes, did not question him concerning the murders and arranged Dr. Albert's coming to the defendant. (Trial Court Memorandum of Decision, Petitioner's App. F at 2f-3f, 16f). While waiting for Dr. Albert at the Prospect Town Hall, Captain McDonnell did note Mr. Acquin's physical appearance and asked Mr. Acquin to show him any marks on his body. Mr. Acquin took down his trousers to show Captain McDonnell some scratches on his thighs. (T-11-12, McDonnell, 7/19/78). Then the defendant left the Command Post and had something to eat at a restaurant parking lot.

The defendant was advised of his rights, for the fourth time, shortly after he arrived at Bethany Barracks. The defendant had requested to go to the Bethany Barracks because he did not want to return to the Prospect Town Hall Command Post. (T-80-81, 7/18/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 3f). At the Bethany Barracks, the defendant was left alone and took a nap.

When Dr. Albert arrived at the barracks, Captain McDonnell ascertained that Dr. Albert was not an attorney and so informed the defendant. (T-85, 7/18/78). When Dr. Albert first met with the defendant, Dr. Albert asked to be alone with Mr. Acquin, and Captain McDonnell left the room. (T-21, Dr. Albert, 7/7/78). After Dr. Albert and the defendant met alone, Dr. Albert called Captain McDonnell back into the room. (T-22, Dr. Albert, 7/7/78). It was after consulting privately with Dr. Albert (T-21-22, Dr. Albert, 7/7/78) that Acquin then gave a detailed inculpatory written statement to both Captain McDonnell and Trooper Hamila in the presence of Dr. Albert. (T-89, 7/18/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 16f, 19f).

Trooper Hamila advised the defendant of his rights, for the fifth time, shortly after Dr. Albert arrived at Bethany at about 11:45 p.m. and just before he took the written detailed statement from Acquin. (T-14-16, 7/12/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 3f). During the time he was with the police and before he gave his detailed inculpatory statement, the defendant, a twenty-seven year old with previous criminal experience, received at least five *Miranda* warnings. (Trial Court Memorandum of Decision, Petitioner's App. F at 10f).

As the defendant gave his statement, Trooper Hamila wrote it down in longhand and gave it to Sergeant Geoghan who typed it. (T-16-17, 7/12/78). Trooper Hamila then read the completed typed statement aloud in the presence of Mr. Acquin who had a copy, and Mr. Acquin turned the pages of the statement in sequence as Hamila read the statement. (T-24-25, McDonnell, 7/19/78). Lorne Acquin then signed the seven-page typewritten statement and initialed each page at about 5:10 a.m. on July 23. (State's Exhibit G for Suppression Hearing, T-37-38, Dr. Albert, 7/7/78) (T-35-36, Dr. Albert, 7/7/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 3f).

Sergeant Geoghan took the defendant's acknowledgement, and Captain McDonnell and Dr. Albert witnessed the signing of the document by Acquin. (T-18, 7/12/78). In the first paragraph of the written confession, the defendant acknowledged that the statement was true and voluntary and was made "without fear, threat or promise of any reward." Acquin also indicated in the statement that he had been fully advised of his constitutional rights by Trooper Hamila and that he fully understood his rights. (State's Exhibit G for Suppression Hearing, T-37-38, Dr. Albert, 7/7/78).

After giving this written detailed statement, the defendant gave a written consent to search the auto of Joyce Graham and consent that hair, blood and urine specimens be taken from him. (Trial Court Memorandum of Decision, Petitioner's App. F at 3f-4f).

The defendant stated in his written detailed statement that his clothing, covered with blood after the killings, was put into a garbage bag and taken from his girlfriend's house by trash collectors on the morning of July 22. (State's Exhibit JJJJ, T-33-34, 8/14/79 PM). However, the blood soaked clothing was found by a trooper, doing a neighborhood investigation, in an opened trash bag still at the rear of Joyce Graham's house on July 22. (T-24-26, 9/11/79 PM).

That clothing was covered with blood which was found to be of the same type as that of Cheryl Beaudoin. (T-51-65, 9/13/79 AM). Head hairs similar to that of Debbie Beaudoin were also found on the clothing. (T-25-27, 9/14/79 PM).

Some singed hair was also found among the defendant's head hair samples. (T-40-44, 9/14/79 PM) (State's Exhibit 6Q1, T-41, 43, 9/14/79 PM).

IV.

At his trial, the defendant testified in support of his motion to suppress the fruits of searches undertaken pursuant to his consent and claimed to have been fruits of his confession.

Mr. Acquin testified that on the morning of July 22, he agreed to accompany the officers to help in the investigation of the Beaudoin fire (T-85, 9/5/79 AM), and that he went to Meriden with the officers without protest (T-7 9/5/79 PM) where he was read his *Miranda* rights and advised he was not under arrest. (T-10-11, 9/5/79 PM).

He further testified that he refused to sign the *Miranda* card at Meriden because he went there to help the police investigate the murders and not to be arrested. (T-11, 9/5/79 PM).

With respect to the incident on Route 69, Mr. Acquin testified he did leave Trooper Hamila's vehicle and start to walk home. Shortly thereafter he was approached by Lt. Shay and asked if he were Lorne Acquin and if he would help the police with the in-

vestigation of the fire. (T-18, 9/5/79 PM). He testified he made no reply and was escorted by the officers back to Hamila's police car. (T-19, 9/5/79 PM).

After arriving at the Prospect Command Post, the defendant testified he was asked for and began to give a statement concerning the three previous days. (T-20-22, 9/5/79 PM). As he gave his statement to Trooper Hamila, Acquin testified, he asked for an attorney and specifically requested Captain McDonnell to call Attorney Engelman. He testified he was offered a public defender which he refused. (T-26-27, 9/5/79 PM). Thereafter, Acquin testified he asked for Dr. Albert because he trusted Dr. Albert and stated he would give a statement when Dr. Albert arrived. (T-31, 9/5/79 PM). Acquin testified it was he who brought up the name of Dr. Albert who was later present when Acquin gave his statement. (T-109-17, 9/5/79 PM).

It was at his request, Acquin testified, that he did not return to Prospect after going to Howard Johnson's Restaurant for supper, but went to Bethany Barracks. (T-33, 9/5/79 PM). At Bethany Barracks, he testified, he dozed in a chair while he waited for Dr. Albert to whom he spoke alone when Dr. Albert first arrived. (T-37-38, 9/5/79 PM). It was thereafter that he gave his statement to the police. (T-39-46, 9/5/79 PM).

Acquin testified he was twenty-nine years old in 1979, had been arrested twelve times in the past and was familiar with the *Miranda* warnings. (T-51-52, 9/5/79 PM). He testified and demonstrated that he could read (T-53-86, 9/5/79 PM) and testified that he had completed one year of high school. He further testified that he did sign the statement given to Captain McDonnell and Trooper Hamila and witnessed by Doctor Albert. (T-53-59, 66, 9/5/79 PM).

In the course of this hearing to suppress, other witnesses as well as Mr. Acquin testified concerning the circumstances of Mr. Acquin's confession. The trial court found the consents were valid. (Trial Court Memorandum of Decision, Respondent's App. A).

At the conclusion of the trial, the defendant filed a motion for a new trial and for a judgment of acquittal. One of the claims in the motion was that the court had erred in ruling upon evidence during the trial and in ruling upon motions.

In a memorandum of decision dated November 19, 1979, Judge Pickett referred to Judge Wall's memorandum of February 28, 1979, and stated: "[T]his court also heard many of the same witnesses as well as Mr. Acquin during a hearing on a motion to suppress tangible evidence, and concurs in the findings of Judge Wall." (Trial Court Memorandum of Decision, Respondent's App. B at 3b).

V.

At the trial, evidence was introduced that Cheryl Beaudoin, the mother, was the victim of multiple fractures of the skull and stab wounds (T-97-98, 8/1/79 AM), that Fredrick Beaudoin, Jr., age 12, suffered a skull fracture (T-20, 8/3/79), and that Paul Beaudoin, age 8 (T-46, 8/2/79 AM), Roderick Beaudoin, age 7 (T-9, 8/2/79 PM), Jennifer Santoro, age 6 (T-42, 8/2/79 PM), Debbie Beaudoin, age 9 (T-27-28, 8/7/79 AM), Sharon Beaudoin, age 11 (T-29, 8/7/79 PM), Holly Beaudoin, age 6 (T-51, 8/3/79 PM), and Mary Lou Beaudoin, age 4 (T-65, 8/3/79 PM), all suffered skull fractures and inhaled smoke.

Due to a mislabeling of ante mortem photographs, up to the time of the middle of the trial it had been believed that the body of Debbie Beaudoin exhibited an injury to the vagina. However, the body bearing the vaginal injury was in reality that of Sharon Beaudoin. (T-5-6, 8/8/79 AM).

In his statement the defendant stated it was Sharon's body that he had rubbed and that he may have touched her vagina with his finger the night of the murders. (State's Exhibit JJJJ, p. 6, T-33-34, 8/14/79 PM).

At the trial, the State also offered evidence, not heard by the jury, that while at the Whiting Forensic Institute in October, 1977,

the defendant told a reporter for the *Hartford Courant* that he recalled talking to Cheryl the night of the killings and next recalled bodies and blood all over the place and the house being on fire before he fled the Beaudoin house. (State's Exhibit 7J's, T-5-7, 10/3/79 PM).

VI.

As can be seen by a review of the petitioner's and the respondent's statements of facts, serious conflicts as to facts appear to exist. The respondent submits that specific references do support its facts and that this Court should not be asked, "in the interest of brevity and the preliminary nature of this petition" (Petition at 5 n.1), to decide legal issues on "facts" in summary form rather than on those facts specifically supported in the record.

The respondent does not imply that many of the "facts" in the petition, not directly contradicted by the respondent's statement of facts, can find support in the record, but page limitations preclude their specific denial in this brief.

SUMMARY OF ARGUMENT

1. The petition for a writ of certiorari should be denied because the Connecticut Supreme Court's holding that the defendant waived his right to counsel is consistent with controlling decisions of this Court. First, as required by *Edwards v. Arizona,* 451 U. S. 477 (1981), the trial court and the Connecticut Supreme Court applied the *Johnson v. Zerbst* "knowing and intelligent" waiver standard in reaching the conclusion that the defendant had waived all his *Miranda* rights before confessing. Second, in light of the facts of this case, the Connecticut Supreme Court's conclusion that the defendant waived his right to counsel is consistent with this Court's holding in *Edwards.*

2. The petition for a writ of certiorari should be denied because the Connecticut Supreme Court's conclusion that the defendant's confession was not obtained in violation of his fourth

amendment rights is consistent with settled and controlling decisions of this Court. When the police first met the defendant at 9:30 a.m. on July 22, 1977, the defendant agreed to accompany the police. Therefore, under this Court's holding in *United States v. Mendenhall,* 446 U.S. 544, 511-12 (1980), there was no "seizure" of the defendant at that time. Prior to the 2:00 p.m. meeting on the highway with Lt. Shay, the defendant had not been "seized," since, under all of the circumstances, a reasonable person would have believed that he was free to leave. *See United States v. Mendenhall,* 446 U.S. at 554. At 2:00 p.m., probable cause had arisen to detain the defendant. Since the defendant gave his confession well after 2:00 p.m., it cannot be said that any illegal detention lead to the defendant's confession. *See Rawlings v. Kentucky,* 448 U.S. 98 (1980); *Johnson v. Louisiana,* 406 U.S. 356, 365 (1972).

3. The petition for a writ of certiorari should be denied because the Connecticut Supreme Court's conclusion that the defendant's will to resist was not overborne by the conduct of the State Police is supported by the evidence and is consistent with controlling decisions of this Court. Dr. Joel Albert, a psychiatrist and neutral third-party, was present, at the defendant's request, when the defendant gave his confession. Dr. Albert testified, based on firsthand knowledge, that the defendant's confession was voluntary. Furthermore, the respondent submits that the resolution of this factual issue is not one calling for the grant of certiorari because of "special and important reasons."

ARGUMENT

REASONS FOR DENYING THE WRIT

I.

The Decision of the Connecticut Supreme Court Is Consistent with this Court's Decisions in *Edwards v. Arizona,* 451 U.S. 477 (1981), and *Rhode Island v. Innis,* 446 U.S. 291 (1980).

A. Under the "knowing and intelligent waiver" standards applied by this Court in *Edwards v. Arizona,* the trial court and Connecticut Supreme Court correctly concluded that the defendant waived all his *Miranda* rights before he confessed.

There is no question that before the defendant gave his written confession, he was five times advised in full of his rights as set forth in *Miranda v. Arizona,* 384 U.S. 436 (1966). (Trial Court Memorandum of Decision, Petitioner's App. F at 10f; Connecticut Supreme Court Decision, Petitioner's App. A at 48a).

The issue presented is whether the defendant waived those rights before he gave his oral and written detailed confessions on the night of July 22 and early morning of July 23, 1977. This issue was recently discussed in *Edwards v. Arizona,* 451 U.S. 477, 482 (1981), where this Court held that the Arizona Supreme Court applied an erroneous standard for determining waiver where the accused had specifically invoked his right to counsel. The Arizona Supreme Court was held to have erred in finding a voluntary waiver without also finding "a knowing and intelligent relinquishment or abandonment of a known right or privilege," as required by *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). The trial judge in this case, however, specifically found that "the defendant had knowingly and intelligently waived his right to counsel." (Trial Court Memorandum of Decision, Petitioner's App. F at 17f).

In this case the evidence is quite clear, and it was so found by the trial judge, that the defendant requested that Dr. Albert be with him when he spoke to the police and that he waived counsel after Dr. Albert had been with him and conferred with him. (Trial Court Memorandum of Decision, Petitioner's App. F at 19f-20f). As the defendant recognized in his petition, both the defendant and Dr. Albert testified that they met alone, and after this meeting Dr. Albert called Captain McDonnell back into the room and the defendant's confession was taken. (Petition at 16; T-21-22, Dr. Albert, 7/7/78; T-38, 9/5/79 PM).

The exchange leading to the defendant's request for Dr. Albert came about when the defendant told Captain McDonnell that when he asked for an attorney it really was not an attorney he wanted but somebody he could trust to be there with him before he had any further conversation with the police. This conversation occurred after Captain McDonnell told the defendant that he would call any attorney the defendant wished, a public defender, or that he would contact the defendant's brother who might be at the Prospect Command Post to obtain an attorney for the defendant. The defendant replied that he had no attorney in mind that he wanted or trusted, that he did not want a public defender and that he did not want his brother involved or even to know that he was in the building. It was then that the defendant suggested Dr. Albert whom Captain McDonnell did not know. Captain McDonnell asked the defendant if Dr. Albert was a lawyer, and Mr. Acquin replied that Dr. Albert was "a shrink" and he was not sure whether or not he was an attorney. Captain McDonnell then stated if Dr. Albert was not an attorney, Dr. Albert could not play the part of an attorney. The defendant repeatedly stated he was not really concerned with that, that what he wanted was somebody he trusted to be with him. (Trial Court Memorandum of Decision, Petitioner's App. F at 11f-18f).

When Dr. Albert did arrive at the Bethany Barracks, Captain McDonnell determined that Dr. Albert was not an attorney and so informed Lorne Acquin. (T-85, 7/18/78). After Dr. Albert conferred alone with the defendant and was assured by the defendant that he wanted him to be with him, Dr. Albert called Captain McDonnell into the room with the defendant. (T-21-22, Dr. Albert, 7/7/78). In response to Captain McDonnell's question, "What happened?", the defendant stated he wished the police to ask him specific questions which he did answer while Dr. Albert was with him. (T-85-86, 7/18/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 16f).

Dr. Albert had been present when Mr. Acquin was advised of his rights, including his right to have counsel present. (T-23,

25-26, Dr. Albert, 7/7/78). If Mr. Acquin had asked for counsel, Dr. Albert testified, and he was not getting counsel, Dr. Albert would have made it clear the defendant was not being given his rights and would have told him to remain silent. (T-58-59, 7/14/78). If the defendant had asked for counsel, according to Dr. Albert, and did not get one, Dr. Albert would have done something about it. (T-82, 7/12/78).

While the formal written statement was being prepared from the oral statement, the defendant and Dr. Albert were alone and at that time Mr. Acquin asked Dr. Albert whether he should have or have had counsel. (T-74, 7/12/78). Dr. Albert stated if the defendant wanted counsel that would be perfectly fine and it was Mr. Acquin's decision, it was up to him to determine. (T-45-46, 7/14/78). Up to that point Mr. Acquin had not made any mention to Dr. Albert that he had asked for counsel, and it did not appear to Dr. Albert that Mr. Acquin was actively looking for a lawyer. (T-59, 7/14/78). It appeared to Dr. Albert that it was very important for the defendant to unburden himself. (T-59, 7/14/78).

Thereafter, the defendant read, had read to him, initialed and signed a seven-page typewritten detailed statement which began by stating that the defendant had been fully apprised of his rights and understood them. (T-46, 61, 9/5/79 PM) (Trial Court Memorandum of Decision, Petitioner's App. F at 3f).

The process leading to this confession and the very confession itself were witnessed in this case by an individual called to the police station at the suggestion of the defendant. Dr. Albert, an experienced psychiatrist, with a reputation as "conscience of the administration" (T-3, Dr. Albert, 7/7/78) or "ombudsman" of the Connecticut jail system (T-111, 7/12/78), was asked his opinion of the defendant's condition when he waived his rights and gave his statement. (T-38-39, Dr. Albert, 7/7/78). Dr. Albert stated the defendant appeared "under control." (T-39, Dr. Albert, 7/7/78).

As Dr. Albert described the defendant, the defendant recognized Dr. Albert whom he had not seen in quite awhile, was able to talk in a clear, rational, coherent manner, was responsive to questions and gave vent to no emotional outbursts. (T-83-84, 7/12/78).

Dr. Albert also testified the defendant's statement was voluntary. (T-17, 7/14/78). Dr. Albert testified, further, that he observed the police used no pressure on the defendant (T-71, 7/12/78), and exercised no coercion or manipulation (T-91, 7/12/78), and that the defendant's statements were given of his own free will. (T-96, 7/12/78). The doctor stated that when the defendant first confessed to the police he did so "in a spontaneous" manner. (T-22-23, Dr. Albert, 7/7/78).

The doctor was present when the defendant was twice advised of his rights, and he observed that the defendant acknowledged his rights and understood them before his detailed statement was written down in longhand by Trooper Hamila. (T-23, 26, Dr. Albert, 7/7/78; T-71-72, 7/12/78). The doctor observed that the defendant then understood what was going on and that he knew what it meant to have or not have an attorney. (T-78, 7/12/78).

The trial judge in this case found that, in view of all the evidence, the defendant did waive his right to remain silent. (Trial Court Memorandum of Decision, Petitioner's App. F at 19f). The evidence does support this finding. Dr. Albert specifically testified that he was present when the defendant refused to sign the *Miranda* card but verbally agreed to go on with the proceedings leading to his confession. (T-71, 7/12/78).

Based on all the facts discussed above, the trial court found: "It is an inescapable conclusion that Lorne Acquin knowingly and intelligently waived his fifth and sixth amendment rights to remain silent and to have counsel during the interrogation." (Trial Court Memorandum of Decision, Petitioner's App. F at 19f-20f).

The Connecticut Supreme Court, also applying the *Johnson v. Zerbst* standard, upheld the trial court's conclusion that the de-

fendant knowingly and voluntarily waived his rights to counsel and to remain silent. (Connecticut Supreme Court Decision, Petitioner's App. A at 47a-49a).

In considering the waiver issue, both the trial court and the Connecticut Supreme Court properly focused on whether the defendant understood his *Miranda* rights and intelligently, knowingly and voluntarily relinquished them. The State court decision on this issue then is in accord with this Court's holding in *Edwards* that a waiver of counsel must not only be voluntary but also a knowing and intelligent relinquishment of a known right. *Edwards,* 451 U. S. at 482-84.

B. Assuming *Edwards v. Arizona* announced a new standard for waiver of the right to counsel, when that right has been clearly invoked, the Connecticut Supreme Court correctly concluded that the standard was not violated in the defendant's case.

The majority of this Court in the *Edwards* case held that the police may not "at their instance" "reinterrogate" an accused in custody if he has clearly asserted his right to counsel. *Edwards,* 451 U. S. at 485. With respect to this requirement, this Court pointed out that an accused could waive counsel without having had access to counsel by "initiating" a meeting with the police, and further that, absent any interrogation, there would be no need to determine if there was a valid waiver of counsel. In a footnote explaining this discussion, this Court noted a series of Courts of Appeals' cases finding a valid waiver in the absence of counsel. In that footnote this Court appears to adopt the rule in the Fifth Circuit that where the right to counsel is clearly invoked a valid waiver cannot be found unless the accused initiates the renewed contact. That footnote ends, however, with this observation:

> Waiver is possible, however, when the request for counsel is equivocal. *Nash v. Estelle,* 597 F.2d 513 (CA5 1979) (en banc).

Edwards, 451 U. S. at 486 n.9.

In his memorandum of decision, the trial judge found that "the defendant's request for counsel was 'indecisive' and under the circumstances Captain McDonnell was correct in making an inquiry into whether the suspect did or did not want counsel present. *Nash v. Estelle,* 560 F.2d 652, 658 (5th Cir. 1977)." (Trial Court Memorandum of Decision, Petitioner's App. F at 16f).

The respondent submits that in upholding the trial court's decision, the Connecticut Supreme Court correctly interpreted the holding and the "equivocal request" discussion found in *Edwards. Cf. State v. Robtoy,* 32 Crim. L. Rep. 2189 (Wash. Nov. 10, 1982) (Washington Supreme Court adopts Fifth Circuit rule on equivocal request for counsel).

As pointed out by Justice Powell in his concurring opinion, the term "initiate" in the *Edwards* case was used to describe a case where a suspect was taken from his cell against his will and subjected to renewed interrogation. Justice Powell observed that "the police do not impermissibly 'initiate' renewed interrogation by engaging in routine conversations with suspects about unrelated matters and may legitimately inquire whether a suspect has changed his mind about speaking to them without an attorney." *Edwards,* 451 U.S. at 490. The equivocal request for counsel thus occurred here during a permissible conversation. Mr. Acquin's waiver of counsel is valid in these circumstances and his "initiation" of the conversation was not required.

Miranda v. Arizona supports this conclusion as well. In approving the procedures for interviews established by the FBI, this Court, in *Miranda,* described FBI conduct when the person being interviewed asks for counsel:

> " 'When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point. *Shultz v. U.S.,* 351 F.2d 287 (1965). It may be continued, however, as to all matters *other* than the person's own

> guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent.

Miranda, 384 U. S. at 485 (emphasis in original).

In a later footnote, this Court points out it agrees that waiver must be judged by the interviewing agent, that the standard of waiver is high, and that ultimately the issue is for the courts. *Miranda,* 384 U. S. at 486 n. 55.

Thus, it is clear in the *Miranda* and *Edwards* cases that the conversation concerning matters other than the defendant's guilt was permissible. It is submitted that the conversation, in aid of the defendant's request for counsel, is not only allowed by *Miranda* but required. To do otherwise would be to ignore the defendant's request. In *Commonwealth v. Clark,* 454 Pa. 329, 335, 311 A.2d 910, 913 (1973), such an inquiry was held not to be interrogation but "rather a further recognition of" the defendant's *Miranda* rights. *See also State v. Phillips,* 563 S.W.2d 47 (Mo. 1978); *Commonwealth v. Bullock,* 459 Pa. 243, 328 A.2d 493 (1974).

Furthermore, both Dr. Albert and the defendant himself testified that they met alone before Dr. Albert called Captain McDonnell back into the room with Mr. Acquin. It was only after this that the defendant gave his detailed oral and later written statements to the police. Although the defendant claimed in his trial testimony that he asked Dr. Albert during this conversation to get Attorney Engelman for him, Dr. Albert testified that Mr. Acquin merely told the doctor he wanted the doctor there with him. As the doctor stated, if the defendant had told him that he wanted an attorney and was not getting one, he would have done something about it. In these circumstances, when Dr. Albert asked Captain McDonnell back into the room and the defendant gave his statement, it can hardly be claimed that the police "initiated" that meeting or "reinterrogated the accused" at their instance.

Rather, it was the defendant who reopened the dialogue with the police after having privately conferred with Dr. Albert. Given the totality of the circumstances, it is clear that the defendant's waiver was knowing and intelligent and was properly found to be so by the trial judge and the Connecticut Supreme Court. *See Wyrick v. Fields,* 32 Crim. L. Rep. 4099 (U.S. Nov. 29, 1982) (per curiam).

This Court may find a factual situation very much like the one in the instant case in the case of *Leuschner v. State,* 45 Md. App. 323, 413 A.2d 227 (1980), *cert. granted,* 451 U.S. 1014 (remanded for further consideration in light of *Edwards v. Arizona), aff'd on remand,* 49 Md. App. 490, 433 A.2d 1195 (1981), *cert. denied,* 102 S.Ct. 1456, *petition for rehearing denied,* 102 S.Ct. 1743 (1982). The respondent submits that the reasoning of the Court of Special Appeals of Maryland, left undisturbed by this Court, supports the admission of the defendant's confession in this case.

In conclusion, the respondent recalls to this Court's attention the fact that Dr. Albert had no connection with the police and was unknown to them. It is unusual that a confession and waiver of rights is witnessed by such a party who must be viewed in light of his testimony as truly neutral. If a confession given under these conditions must be suppressed and the public deprived of its contents and its fruits, the result would seem to defy reason. The respondent respectfully suggests that nothing in *Miranda v. Arizona* or *Edwards v. Arizona* requires such a result upon a grant of certiorari.

II.

The Connecticut Supreme Court Correctly Concluded that the Defendant's Confession Was Not Obtained in Violation of His Fourth Amendment Rights.

In *Dunaway v. New York,* 442 U.S. 200, 207 (1979), this Court held that for purposes of the fourth amendment's prohibition

against unreasonable searches and seizures, a person who is taken into custody and interrogated at a police station is "seized" in the fourth amendment sense *"when taken involuntarily"* to the station. (Emphasis added). This Court went on to state that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person and probable cause is required of the police at that time. *Dunaway*, 442 U. S. at 207 n.6.

This Court has, however, held that where a person consents to going with the police there is no such seizure. In *United States v. Mendenhall*, 446 U. S. 544, 511-12 (1980), this Court held that since the defendant had agreed to go to the DEA office there was no seizure. In this case, when the police first met the defendant at 9:30 a.m. on July 22, they asked him to accompany them concerning this investigation. Both the police and the defendant himself testified that the defendant then agreed to go with the police. No probable cause was therefore required at that time. *United States v. Brunson*, 549 F.2d 348, 358 (5th Cir.), *cert denied*, 434 U. S. 842 (1977).

The defendant argues that the trial judge assumed for the purposes of his decision that the defendant was taken into police custody shortly before 9:30 a.m. (Petition at 18, 19, 27). It is clear from the court's memorandum of decision, however, that the court assumed that the arrest took place at that time merely for the purposes of argument. (Trial Court Memorandum of Decision, Petitioner's App. F at 7f). The court did not make a finding that the defendant was under arrest at 9:30 a.m.

It was obvious in the instant case that, prior to the 2:00 p.m. meeting on the highway with Lt. Shay, Mr. Acquin had not been seized by the police. This was evidenced by Trooper Hamila's intention which he communicated to Acquin and Hamila's starting to drive Acquin home from Meriden. If Hamila intended to place Acquin in custody, he certainly would not have dropped Detective Zdanowicz off in Prospect and continued alone with Acquin in the front seat of the car toward Waterbury. He certainly would not have allowed Mr. Acquin to leave the car and to start walking

down the road without restraining him. It is submitted that, under all of these circumstances, a reasonable person would have believed that he was free to leave. *See United States v. Mendenhall,* 446 U.S. at 554. In fact, Acquin did so believe when he left Hamila's vehicle and started home on foot.

At 2:00 p.m. when Lt. Shay met the defendant on Route 69, it is clear, from the facts known to the police at that time, that probable cause had arisen to detain the defendant. It was only well after that time that the defendant made his incriminating statements. In these circumstances it can hardly be said that any illegal detention lead to his confession. *See Raulings v. Kentucky,* 448 U.S. 98 (1980); *Johnson v. Louisiana,* 406 U.S. 356, 365 (1972); *United States v. Morris,* 451 F. Supp. 361 (E.D.N.Y. 1978), *vacated and remanded,* 597 F.2d 341 (2d Cir.), *aff'd,* 614 F.2d 1292 (2d Cir. 1979); *State v. Harris,* 298 N.W.2d 356, 358 (Minn. 1980).

The respondent submits that the police did have probable cause to detain the defendant at the Prospect Town Hall on July 22, 1977, where he was interviewed and thereafter at Bethany Barracks where he gave his statements.

When the police began to investigate the nine murders at the burnt-out house on the morning of July 22, 1977, they were aware that the house fire had begun before 3:30 a.m. and had engulfed the entire house. Mrs. Beaudoin had been beaten and stabbed. The eight children, her seven and Jennifer Santoro, an overnight guest, had also been beaten, and some were left tied up in the house to burn to death.

The police had learned that the defendant had been at the Beaudoin house on the early evening of July 21, 1977, and had been seen several times that evening driving his girlfriend's black Rambler on the dead-end street near the Beaudoin house.

Fredrick Beaudoin, Sr., had left home for work at Pratt & Whitney Aircraft about 11:00 p.m. that evening not knowing that Lorne Acquin had been at his house earlier. Mr. Beaudoin was not to return home from work until the next morning.

Fredrick Beaudoin, Jr., had told a neighbor boy on July 21 that Lorne Acquin was to stay overnight at the Beaudoin house that very night. Of all who were to stay in the house that night, Lorne Acquin alone survived.

When they came in contact with Mr. Acquin that day, the police found that Lorne Acquin had not gone to work that morning. The defendant claimed that the marks and scratches on his body were the result of an unreported mugging which occurred shortly after 1:00 a.m. that very early morning when he left the last Waterbury bar alone. However, that afternoon the police observed burn marks on his right eyelid and left wrist which were not accounted for by the claimed mugging.

Mr. Acquin, although a close friend of the Beaudoin family, vehemently refused to go by the house with the police. He, however, showed no surprise or emotion when told of the deaths. This took on particular significance in light of the information that he was to stay at the Beaudoin home the prior night, making him the sole survivor among those known or expected to stay there that night.

Mr. Acquin had a reputation for violence and a long and serious criminal record. He had been staying at the Beaudoin house while there was a fire there in the past.

In *Cupp v. Murphy*, 412 U.S. 291 (1973), this Court found probable cause where the defendant was at the scene of the crime, had a motive to kill the victim, and the occupant of the victim's house or a burglar could not have been the killer. The defendant's lack of concern over his estranged wife's death also contributed to the probable cause. A detailed description of the probable cause appears in *State v. Murphy*, 2 Or. App. 251, 465 P.2d 900 (1970). Certainly probable cause existed here where the defendant, with a long criminal record and a past history of arson, was to stay over at the house the very night of the murders and arson, where he sustained injuries including burns which he exhibited shortly after the crimes, and where he showed no concern about the murders.

III.

The Connecticut Supreme Court's Conclusion that the Defendant's Will To Resist Was Not Overborne by the Conduct of the State Police Is Supported by the Evidence And Is Consistent with Controlling Decisions of this Court.

In his petition, the petitioner makes claim that his will to resist the giving of his confession was overborne by the conduct of the Connecticut State Police.

Dr. Joel Albert, an independent, neutral third party, who had been specifically requested to be present by the defendant, was called as a witness and he testified. Although the defendant, while with the State Police, had the opportunity to retain counsel, he instead opted for the presence of Dr. Albert, "somebody that he could trust." (Trial Court Memorandum of Decision, Petitioner's App. F at 14f). Dr. Albert, whom the police officers did not know and who had been called by the defendant himself, testified that in his opinion the confession given by Acquin was done so voluntarily. (T-17, 7/14/78). Dr. Albert was present and personally observed the defendant and the surrounding circumstances when the defendant gave his confession. Dr. Albert's observations and subsequent opinion of the voluntariness of the defendant's confession were based upon his actual visual and aural perceptions and evaluations. This testimony must be far more convincing than opposing opinions of psychiatrists who were not present at the taking of the confession but rather were called at the hearing as witnesses to give their opinions. Clearly, Dr. Albert's reported observations of voluntariness based upon firsthand experience are more impressive than an opinion from someone not having had the advantage of being present, but rather only called as an expert witness, presented a hypothetical question, and giving his opinion well after the event.

In evaluating the evidence produced at the hearing, the trial court concluded that the defendant's confession was spontaneous and voluntary, just as Dr. Albert testified. No physical force or

threats were used on the defendant nor were any promises made to him. There were never more than three policemen with the defendant at any one time. The defendant was not denied any requests for food or drink. He was not under the influence of alcohol or drugs. He signed the confession and initialed each page. (Trial Court Memorandum of Decision, Petitioner's App. F at 22f).

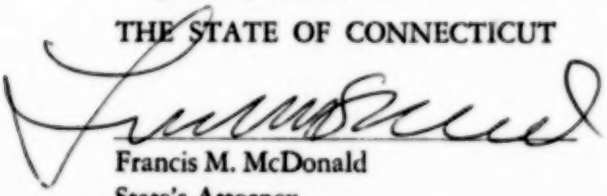
Furthermore, the resolution of this factual issue is hardly one calling for the grant of certiorari because of "special and important reasons."

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THE STATE OF CONNECTICUT



Francis M. McDonald
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Walter H. Scanlon
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APPENDIX A

No. 13052

STATE OF CONNECTICUT : SUPERIOR COURT

vs. : JUDICIAL DISTRICT OF WATERBURY

LORNE J. ACQUIN : SEPTEMBER 11, 1979

MEMORANDUM RE MOTIONS TO SUPPRESS
(#37), (#42), (#45), (#49)

The defendant, Lorne J. Acquin, stands charged with nine counts of murder in violation of section 53a-54a of the General Statutes and one count of arson in violation of section 53a-111. On July 23, 1977, a statement by Mr. Acquin in the nature of a confession was signed by him at 5:10 A.M. On March 2, 1979, the court, Wall J., found the confession to be voluntary and "the product of an essentially free and unconstrained choice by the defendant". See, *State v. Staples* 175 Conn. 398, 402, (1978). There are now before the court motions to suppress dated September 19, 1977 and September 26, 1977 addressed to items of physical evidence obtained from the person of the defendant, his residence, or a vehicle owned by Ms. Joyce Graham.

I.

On July 23, 1977 at the request of Trooper Witte, a urine sample and clippings of head hair were obtained from Mr. Acquin under the authority of his oral consent. At the time the urine was obtained, Mr. Acquin was informed that it was for the purpose of determining whether he was under the influence of any drugs or alcohol. The defendant moves to suppress this evidence on the grounds that it was given while in police custody as a result of an initial warrantless arrest, without a warrant, and without a voluntary and intelligent consent. From the evidence, the court concludes that the consent for the urine, while given voluntarily,

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), was conditioned upon the representation made to Mr. Acquin and is therefore admissible in so far as any tests, including those obtained to show the presence or absence of alcohol and or drugs, but for no other purpose. While the consent of July 23, 1977, executed by Mr. Acquin at 5:18 A.M. is unrestricted as to urine, a request to take blood was withdrawn a short time thereafter. Further, the Supreme Court in *State v. Acquin,* 40 Conn. L. J. No. 42, p. 9, set aside an order to take a blood sample from the defendant. Accordingly, to allow evidence of blood type from an examination of the urine sample would be to permit indirectly what has been disallowed directly.

As far as the hair samples are concerned, the court finds that they are admissible and not subject to suppression. Mr. Acquin, not a newcomer to the law, gave his consent after receiving complete Miranda warnings and without any physical abuse or improper threats. The court finds that this consent was "essentially free and (his) unconstrained choice", and his "will ha(d) (not) been overborne and his capacity for self-determination critically impaired". *Schneckloth v. Bustamonte,* 412 U.S. 218, 225, 93 S. Ct. 2041, 2047, 36 L. Ed. 2nd 854 (1973). As stated in *United States v. Watson,* 423 U.S. 411, 424, 96 S. Ct. 820, 46 L. Ed. 2d 598, reh. denied, 424 U.S. 979, 96 S. Ct. 1488, 47 L. Ed. 2d. 750 (1976), "there were no promises . . . proved or claimed . . . there were no promises made and no indication of more subtle forms of coercion that might flaw his judgment".

II.

On and before July 22, 1977, Ms. Graham was the owner of a 1965 Rambler Classic, 4-door sedan, which she from time to time allowed Mr. Acquin to operate. On that date she executed a consent to search form for that vehicle and a similar form was also executed by Mr. Acquin on July 23, 1977. At the request of Trooper Hamila, the trunk of the vehicle was opened at 4 Glenridge Street and at which time he observed certain items of

personal property. Upon observing these he requested permission to take the vehicle to the Bethany State Police Barracks, which was granted by Ms. Graham. A search warrant for the vehicle was obtained and executed but for reasons not necessary to detail here, including the question of validity, see *State v. Onofrio,* Conn. L. J. Vol. 51 No. 10 pg. 11, the search conducted pursuant to the warrant is found to be without proper authorization.

In evidence are two consent to search forms dated July 22, 1977, signed by Joyce A. Graham, and the other dated July 23, 1977, signed by Lorne J. Acquin. Each of these forms authorizes Trooper Thomas McMullen of the Connecticut State Police Department to conduct a search of the 1965 Rambler automobile. They also authorize "members of the Connecticut State Police Department" to conduct a search. The court rejects the claim of the defendant that any search conducted by anyone but Trooper McMullen is invalid.

In so far as Mr. Acquin relies upon a telephone call from Mr. Lou Gurwitz, an attorney in his attorney's office to revoke his consents, it is without foundation. On July 23, 1977 at approximately 12:35 P.M. Mr. Gurwitz called Lt. James Shay of the Connecticut State Police Department and as related by Lt. Shay the following was the substance of the conversation:

> I received a call from Attorney Lou Gurwitz (phonetic spelling), I believe the correct name is and he indicated that he was associated with you, sir, and he wished to know the whereabouts of your client, Mr. Acquin. I believe I told him he was at that time, at the New Haven State Jail. He also asked me at that time to discontinue any questioning of Mr. Acquin until either yourself or Mr. Gurwitz had a chance to consult with the client.

This being the complete substance of the conversation, it does not constitute a revocation of written or oral consents previously given by the defendant.

The court finds that voluntary consents were given by Mr. Acquin and Ms. Graham and, therefore, the police had authority under those consents to conduct the search on July 23, 1977, at the barracks at approximately 6:50 P.M. The court further finds that Mr. Acquin, not being the owner of the vehicle or being in possession, has no standing to contest any evidence including the shoes and blue socks seized from the vehicle on that date in question. *Rakas v. Illinois,* — U. S. —, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).

Subsequently on August 2, 1977, a further search of the vehicle was made at which time samples of cloth material were obtained from the interior. As to this search, the court finds that the consents were continuing, unrevoked, voluntary authorizations, and further, that Mr. Acquin not being the owner or in possession had no standing to contest the seizure. *Rakas v. Illinois, Supra.* For these reasons the motions to suppress the shoes and cloth material are also denied.

III.

Prior to his arrest, the defendant resided with Ms. Graham at 4 Glenridge Street, Apartment #4, Waterbury, Connecticut. Both Mr. Acquin and Ms. Graham executed voluntary "consent to search" forms which have been offered in evidence. There was also a search warrant for that property, but no evidence obtained from that search warrant has been offered and is therefore not now before the court. Clearly in view of the fact that Mr. Acquin resided at the property and contributed to the rent thereof, he has standing to contest any claimed illegal search and seizure.

On July 23, 1977, Trooper O'Brien, while conducting a neighborhood search for witnesses, observed a green garbage bag in the rear of #4 Glenridge Street, Waterbury, Connecticut. This bag caught his attention by being brighter in color than the other bags in the area and he thereupon "squatted" down, and observed through a slit in the bag a pair of faded orange pants which appeared to have blood on them. The area was immediately

secured and a request made for the crime lab to report. Thereupon Trooper Witte arrived, took pictures, both before and after the bag was opened, obtaining therefrom the pair of trousers and a white "T" shirt. These items the defendant seeks to suppress on the grounds that they were seized without a warrant and without probable cause and are the fruits of an illegal arrest and confession.

The consent to search form dated July 22, 1977 signed by Joyce A. Graham and one dated July 23, 1977 signed by Lorne J. Acquin are relied upon by the State. Each of these forms authorizes specific members of the Connecticut State Police Department, including Sgt. Nicholas Valerio, Trooper John Witte and Trooper Thomas P. McMullen. They also authorized "members of the Connecticut State Police Department" to conduct a search. Accordingly, the court finds that the consent to search forms constituted authorization for the search and seizure conducted on July 23, 1977. *See Dotson v. Warden,* 40 C.L.J. 6, p. 19 (Aug. 8, 1978). The court further finds that the items in question constituted trash and abandoned property, *United States v. Shelby,* 573 F. 2d 971 (7th Cir.), *Cert. denied,* — U. S. —, 99 S. Ct. 132, 58 L. Ed. 2d 199 (1978), having been placed in a plastic bag and deposited with other items of garbage for collection by the Sanitation Department of the City of Waterbury. The result reached herein is in accord with every United States Circuit Court of Appeals which has considered the issue. *See United States v. Crowell,* 586 F. 2d 1020, 1025 (4th Cir. 1978), *Cert. Denied,* — U. S. —, 99 S. Ct. 1500, 59 L. Ed. 2d 772 (1979), and cases cited therein.[1] Accordingly, the motion to suppress these items is denied.

PICKETT

_____, J.

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1. California and some other states have held *contra. See id.* at 1025 n.2. This court agrees with the observation of Judge Wood of the Seventh Circuit that it seems more prudent to put only genuine trash, not secrets, in garbage cans, except perhaps in California. See *United States v. Shelby, supra,* at 974.

APPENDIX B

No. 13052

STATE OF CONNECTICUT : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF WATERBURY

LORNE J. ACQUIN : NOVEMBER 19, 1979

MEMORANDUM RE MOTION FOR NEW TRIAL (#166) AND MOTION FOR JUDGMENT OF ACQUITAL (#167)

On October 19, 1979, the defendant, Lorne J. Acquin, was found guilty after a trial by jury of nine counts of murder, General Statute § 53a-54a, and one count of arson in the first degree, General Statute § 53a-111. Upon the acceptance and recording of these verdicts, the defendant filed a motion for a new trial and a motion for judgment of acquital.

I.

MOTION FOR JUDGMENT OF ACQUITAL

The motion for judgment of acquital claims that the State has failed to make out a prima facie case and that, as a matter of law, no jury would be warranted in returning a verdict of guilty since the State failed to prove its case beyond a reasonable doubt. No useful purpose would be served by an attempt to review the evidence covering 5215 pages of testimony presented between July 16, 1978 and October 11, 1979. It is sufficient to note that the defendant's confession and physical evidence, along with other evidence, afforded an ample basis for the jury to reach its verdict of guilty.

The trial court is under a duty to set aside a verdict "if its manifest injustice was so plain and palpable as to justify the suspicion that the jury or some of its members were influenced by prejudice, corruption or partiality." *Roma v. Thames River Specialties Co.,*

90 Conn. 18, 19-20. As recently reviewed in *State v. Avcollie,* Conn. (41 Conn. L. J. No. 4, p. 1), the trial judge must see that a jury is not effected by improper inferences and overturn a verdict, "[w]here testimony is thus in conflict with indisputable physical facts, the facts demonstrate that the testimony is either intentionally or unintentionally untrue, and leave no real question of conflict of evidence for the jury concerning which reasonable minds could reasonably differ." *Budaj v. Connecticut Co.,* 108 Conn. 474, 476. The final test is "whether the jury could reasonably have concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt." *State v. Chetcuti,* 173 Conn. 165, 172; *State v. Avcollie,* supra, 4. Applying these tests to the evidence in this case, the court finds that there is no basis for it to interfere with the verdicts of guilty.

II.

MOTION FOR NEW TRIAL

The motion for a new trial raises similar claims, already discussed by the court, that the verdict was against the weight of the evidence and that the State did not offer sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt. In addition, this motion claims that the court erred in its charge in rulings upon evidence during the trial and that rulings upon motions were erroneous.

II.

A.

CLAIMED ERRORS PRIOR TO TRIAL

Prior to trial the Honorable Robert A. Wall[1] heard pretrial motions filed by the defendant. These motions include a motion

1. Judge Wall was originally scheduled to preside at the trial of this case but did not since he was to reach retirement age before its conclusion.

for expenses for a public opinion survey (#57.5), denied January 3, 1979, memorandum (#65), a motion to dismiss the indictment on the grounds that its foreman was hand picked and white (#111), denied May 16, 1979, memorandum (#112), a motion to dismiss jury panel (#71), denied May 16, 1979, memorandum (#113), and a motion for change of vanue (#57), denied May 17, 1979, memorandum (#115). The reasons for the denial of these motions are well documented in the memoranda of Judge Wall. The court notes, however, that while considerable time was required to select a jury of twelve together with four alternates, the major difficulty was not pretrial publicity but rather the projected length of the case and prior plans of prospective jurors during employment shutdowns and vacations. The defendant has not sustained his burden of showing that he could not receive a fair and impartial trial in Waterbury. *State v. Rogers,* 143 Conn. 167, 172; *State v. Piskorski,* Conn. (40 Conn. L. J. No. 51, pp. 1B, 3B).

During the summer of 1978, Judge Wall conducted a lengthy evidentiary hearing on the defendant's motion to suppress his confession, statements and admission. (#33). This motion was denied March 2, 1979, for the reasons set forth in a memorandum dated February 28, 1979, in which Judge Wall found that "the State . . . sustained its burden of proof that the defendant's confession was voluntary by a fair preponderance of the evidence" and that it "was the product of an essentially free and unconstrained choice by the defendant." See *State v. Staples,* 175 Conn. 398, 402 (1978). While this ruling was accepted as the law of the case, this court also heard many of the same witnesses as well as Mr. Acquin during a hearing on a motion to suppress tangible evidence, and concurs in the findings of Judge Wall.

The second juror accepted by both the State and the defendant was Mr. Paul T. Reeder. The defendant claims that in view of the provisions of § 51-219 of the General Statutes, Mr. Reeder was disqualified as a matter of law by reason of his being a member of the Middlebury volunteer fire department. At the time this

juror was chosen on June 6, 1979, the statute exempted "all regular members of . . . any fire department . . . organized under the laws of this state . . . ." Mr. Reeder did not claim an exemption but indicated a willingness to serve. Further, as indicated, he was accepted by the defendant who was given thirty challenges - eighteen on the indictment, eight on the information, and four additional for the choosing of four rather than two alternates. From his acceptance of the juror, it is reasonable to infer that Mr. Reeder was found to be well qualified unless disqualified as a matter of law.

The issue raised by the defendant's claim may be disposed of by an examination of Public Act 79-386 effective October 1, 1979. It includes in the list of persons exempt from jury duty "regular active members of any volunteer fire company." Since this group had not been listed before this statutory change, it is apparent that the general assembly did not consider the former statute as covering it. See *Engle v. Personnel Appeal Board*, 175 Conn. 127, 130. The court finds no merit to the claim that Mr. Reeder was disqualified as a matter of law since he was eligible when chosen and sworn as a member of the panel.

III.

CLAIMED ERRORS DURING THE TRIAL

Admonitions and Inquiry of Jury

On July 7, 1978, the American-Republican, Incorporated, filed an action against Judge Wall's order to close the suppression hearing of Mr. Acquin's confession which he had requested. *American-Republican, Inc., et al v. Hon. Robert Wall et al,* CV H78-348. After hearing, the United States District Court, Clarie, J., ruled on July 19, 1978, that "Judge Wall's cloture order does not violate the plaintiff's constitutional rights." Thereafter there was a further hearing and a ruling by Judge Clarie on June 19, 1979, after the selection of a jury in this case was in progress, which again denied a motion for temporary injunction to grant immediate

disclosure but ordered that "when the jury and alternates have been impaneled and sworn, the defendant, Court Clerk Francis J. Butler, shall make available to the press and the public all transcripts and exhibits, except such matter as is otherwise subject to a privilege, which have hereto been sealed by the state court's order."

As part of its written memorandum the court included the following:

> "While each trial judge has his own methods for securing compliance with his disciplinary instructions to the jury, the presiding judge at a minimum would be expected to deliver a stern admonition to the jury at the close of each court session, stressing the importance of avoiding reading about, listening to accounts of, or discussing the trial with anyone. This would be followed up on the record with questioning at the opening of each court session, including individual inquiry where necessary, to insure that the court's instructions were being obeyed. On each such occasion, counsel should be asked to affirm on the record their satisfaction, or lack thereof, with the jurors' responses."

At the conclusion of the morning and afternoon sessions, the court instructed the jury not to read about the case, listen to any news broadcasts, discuss it with anyone, or allow anyone to communicate with them. In addition, upon their return the court inquired as to whether or not anyone had anything to bring to its attention which might influence his or her decision. Both counsel in their questioning of prospective jurors, and the court after the jury was selected, impressed upon each juror the importance of determining the issues in the case from the evidence found to be admissible and the law as given by the court. It is the law of this state, and no doubt every state, that a trial judge has a wide and liberal discretion in the conduct of a trial with the view to seeing to it that both the interests of the state and the defendant are pro-

tected. *Antel v. Poli,* 100 Conn. 64; *Wojculewicz v. Cummings,* 145 Conn. 11, 21. To require, as the federal court suggests, that "counsel should be asked to *affirm on the record their satisfaction, or lack thereof,* with the juror's responses" [Emphasis added] to inquiries by the court about outside influences, is to ignore the essence of the adversary system. There are few, if any, defense counsel who would make such an admission on the record. The court rejects the suggestion of the defendant that the trial was not conducted in accordance with the guidelines of *American-Republican, Inc. et al v. Wall,* if, in fact, that case has any bearing as far as Mr. Acquin is concerned since he was initially the moving party for cloture.

B - PHOTOGRAPHS

The State offered in evidence certain photographs of the bodies of the victims after debris had been removed but while their bodies were in the same place and condition as found by the medical examiner. (Exhibits NN, OO, PP, QQ, RR). These pictures were offered to show "the condition of the bodies especially with respect to their being and the conditions of their limbs with respect to the bindings and the condition of the bodies shortly before they were removed for the chief medical examiner's office . . . . " Tr. Vol. 9, A.M., p. 40. The defendant objected to the offer on the ground that the photographs were inflammatory and that the State had not shown that the bodies remained in the same position and their condition had not been altered. After conducting a hearing on the latter objection, the court allowed the photos as full exhibits.

If a photograph is relevant and material, the fact that it may be gruesome does not render it inadmissible. *State v. Marshall,* 166 Conn. 593, 602. The offer of these photos was relevant to the claims by the State as to the murder of the victims and their being bound as portrayed and were, therefore, admissible. *State v. Schaffer,* 168 Conn. 309, 313.

Also offered in evidence were pictures of the defendant taken at the Bethany barracks on July 23, 1977, which were offered to show

scratches and burns upon his body. (Exhibits KKKK, LLLL, MMMM, NNNN, OOOO). Tr. Vol. 17, pp. 58-75. These pictures were objected to on the grounds that they were the fruit of the illegal arrest of the defendant and his oral confession. After a hearing in the absence of the jury, the court overruled the objection and allowed the photos in evidence to show claimed scratches and burns on Mr. Acquin's body. For this purpose they were relevant and material and therefore admissible. *State v. Castagna,* 170 Conn. 80, 89.

C - MOTIONS FOR MISTRIAL AUGUST 3, 1979

On August 3, 1979, during the afternoon session, counsel for the defendant made a motion for mistrial claiming that his client could not have a fair trial since the grandfather of the Beaudoin children was escorted from the courtroom during the testimony concerning autopsy reports by Dr. Catherine Galvin. Tr. Vol. 12, P.M., p. 52. The court denied this motion and in addition refused to instruct the jury at that time not to be influenced by any outburst in the courtroom. Tr. Vol. 12, pp. 14, 15a, 15b. The ruling of the court was based upon the fact that Mr. Champagne had not been a witness or otherwise identified to the jury. Further, his exit was not any more disturbing than any other individual who might have left at the time, whether required by emotion or any other personal dictate. Had the court cautioned the jury at that time, without referring to the incident, the instruction would have been meaningless. To have referred to it would have only brought it to the attention of the jury and, therefore, magnified the incident in their minds. Finally, the court, before jurors were selected, during the course of the trial, and in its charge gave numerous instruction as to the duty of the jury to consider the case only from evidence admitted in the trial. The court finds no basis for the claim that this motion for mistrial or for cautionary instructions should have been granted. *State v. Brown,* 169 Conn. 692, 703.

During her testimony on August 3, 1979, Dr. Catherine Galvin sought to refresh her recollection and had difficulty locating a page

in her file. Tr. Vol. 12, P.M., p. 27. She offered the comment that it might not have been returned when her autopsy report was copied for Mr. Williams. Mr. McDonald suggested that Mr. Williams let the doctor see his copy and the court made the same suggestion. The defendant's copy was not turned over but the missing page was found in another autopsy file by Dr. Galvin.

In the absence of the jury the defendant moved for a mistrial on the ground that by its comment the court informed the jury that defense counsel had been given copies of this witness's report. It is difficult to understand the thrust of the defendant's claim, since with each witness the jury observed counsel referring to various documents in his cross-examination. Since the document in question was a copy of the official report, the court finds no prejudice to the defendant by the jury being aware that his attorney had in fact seen it, and, therefore, finds no basis for a mistrial. *State v. Grayton,* 163 Conn. 104, 112; *State v. Turcio,* Conn. (40 Conn. L. J. No. 52, p. 4, 12).

D - CLAIM RE EX. 66 ID

On August 1, 1979, during the course of his examination of Dr. Elliot Gross regarding the results of the autopsy of Sharon Lee Beaudoin, Mr. McDonald referred to his trial folder, ex. 66 ID, which contained an 8 x 10 inch copy of a black and white photo of this victim and a 2 x 3 inch color photo of the seven Beaudoin children. During a portion of this examination Mr. McDonald was positioned at the corner of the jury box where juror #8, Mr. Herbert Hughes, was seated. Mr. Williams moved for a mistrial or, in the alternative, the right to voir dire the juror as to whether he had seen the photos, which requests were denied.

The court finds that this inadvertent occurrence was not such that it is apparent that the defendant could not have a fair trial. *State v. Peary,* Conn. (40 Conn. L. J. No. 13, pp. 1, 2. The pictures were not inflammatory and further, from the court's observation, it cannot be concluded that Mr. Hughes did, in fact, see

either. To have permitted a voir dire would only have brought to that juror's attention something he may not have seen, and if he did, to have magnified the incident. Finally, the court, on numerous occasions during the trial and in its charge, instructed the jury that it could consider only evidence found to be admissible. This claim of the defendant is rejected in the discretion of the court. *State v. Ruiz,* 171 Conn. 264; *State v. Brown,* 169 Conn. 692, 703.

E.

TESTIMONY OF TROOPER GEORGE R. HAMILA AUGUST 14, 1979

On July 22, 1979, Mr. Acquin was picked up and taken to the command post at the Prospect Town Hall where Trooper George R. Hamila, after advising the defendant of his rights, proceeded to take his statement, commencing at approximately 3:15 p.m. At around 5:30 p.m. the taking of this statement concluded. Over objection the court allowed the witness to inform the jury what happened at that time.[2] The defendant moved for a mistrial on the ground that the State had shown the defendant's invocation of his right to remain silent.

First, it must be noted that Mr. Hamila had been allowed to testify without objection that he had commenced the taking of

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2. By Mr. Scanlon: Q. Did it conclude at 5:30 or 5:45?

A. Yes it did.

Q. Tell us what happened at that time.

Mr. Williams: Objection Your Honor please, on grounds stated previously.

The Court: Overruled.

By Mr. Scanlon: Q. Tell us what happened.

A. Lorne stated to me that—he says: "I think I am in trouble, I think I better get a lawyer."

Tr. Vol. 17, P.M., pp 10, 11.

a statement which continued for over two hours. In view of this the jury was entitled to hear the reason for the termination of the interview, especially since a seven page confession was to be admitted into evidence. (Exhibit JJJJ).

The claim of the defendant that the cases of *Doyle v. Ohio,* 426 U. S. 610, 96 S. CT. 2240, 49 L. Ed. 2d 91 (1976) and *United States v. Hale,* 422 U. S. 171, 95 S. CT. 2133, 45 L. Ed. 2d 99 (1975) are governing is rejected. These consider the use of a defendant silence while in custody for impeachment purposes and, further, the line of inquiry was actively pursued rather than, as in this case, a single reference to a response by the defendant that he better get a lawyer. *Meeks v. Havener,* 545 F.2d 9, 10 (6th Cir. 1976). As stated in *State v.Zeko,* Conn. (40 Conn. L. J. No. 47, pp. 1, 5, "The instant case does not present a prosecutorial focus—by repetitive questioning, on a defendant's silence, as in *Doyle v. Ohio,* supra."

E
MOTION TO CLOSE SUPPRESSION HEARING

On August 16, 1979, the court began hearing evidence in the absence of the jury on the defendant's motions to suppress (#37, #42, #45 and #49). Later in the day his counsel moved to close the hearing to the press and the public. Practice Book § 895. Representatives of the news media objected to this motion and requested a hearing to determine its necessity. See *Gannett Co. v. DePasquale,* — U. S. —, 61 L. Ed. 2d 608, 99 S. Ct. 2898.

At the time the motion was made the jury had been excused until August 28, 1979, while the court heard evidence on the motions. In view of the concurring opinion of Justice Powell in *Gannett,*[3] the court concluded that such a hearing was required

3. "Upon timely objection to the granting of the motion, it is incumbent upon the trial court to afford those present a reasonable opportunity to be heard on the question whether the defendant is likely to be deprived of a fair trial if the press and public are permitted to remain in attendance." Concurring opinion of Justice Powell.

and further determined that rather than risk a delay by a further application to the federal courts if a motion to close were granted, that a postponement of the hearing until after the jury was due to return was advisable.

On August 28, 1979, the jury reported and were instructed that the court was still considering matters which did not require their presence and also was given detailed cautionary instructions as to their duty not to allow any outside influence or information effect their impartiality. See Appendix A. The defendant's motion to exclude the public was denied and the hearing continued until the jury returned on September 11, 1979. On that day the court filed a memorandum (#142) denying the motion to suppress except that the use of a urine sample to test for blood type was sustained. In view of the fact that none of the jurors indicated than any information was received during the course of the suppression hearing, and further that except as indicated the motions were denied, the court finds that the refusal to exclude the public was proper in its discretion. See *State v. Echols,* 170 Conn. 11, 13.

F

MOTION TO STRIKE TESTIMONY

On August 29, 1979, the court granted the defendant's motion to make the State's file available to him for examination. Thereafter, on September 13, 1979, he moved for a mistrial or strike the testimony of Mr. Fred Beaudoin, Mr. Alden Brooks, Capt. Thomas McDonnell and Ms. Frances Paolino (#141). This motion claims that the prosecuting authority had elected "not to comply with an order of the judicial authority to deliver to the defendant any statement of a witness who has testified . . . . " The court found that the State had not *elected* not to comply, that some of the material would not have been admissible, did not constitute a *statement,* and that at best the failure to deliver was inadvertent. This motion was denied on the condition, agreed to by the State, that any or all of these witnesses would be produced, if requested, at the expense of the State. No prejudice to the defendant is found in this ruling.

G

MOTION TO DISMISS OR MISTRIAL

SEPTEMBER 13, 1979

On September 13, 1979, the defendant filed a motion to dismiss or a mistrial "based on gross prosecutorial conduct during this trial." Tr. Vol. 30, A.M., p. 3. He claimed that the State had in its file information that the autopsies were conducted before the confession and that prejudicial photographs were displayed to the jury. The court finds no merit to either of these claims. Copies of all autopsy reports were furnished to the defendant, and in addition, each pathologist was a witness and available for cross-examination. In regard to the display of prejudicial photos to the jury, the court believes that if in fact any juror or jurors did see a picture in the State's file, its instructions both during the trial and in its charge covered any possible prejudice.

H

CHAIN OF CUSTODY AT F. B. I.

The defendant claims that the State did not complete the chain of custody of physical items transported to the F.B.I. The burden of proof in the chain of custody issue is upon the State, *State v. Johnson,* 162 Conn. 215, 232, but it "is not compelled to prove each and every circumstance in the chain of custody beyond a reasonable doubt." *State v. Hall,* 165 Conn. 599, 605. The court finds that the State sustained its burden by detailed and credible evidence.[4] *State v. Brown,* 163 Conn. 52, 57; *State v. Lockman,* 169 Conn. 116, 122.

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4. In view of the numerous items of physical evidence, Chief Inspector Foley, Trooper John R. Witte, members of the State Police, and Asst. Clerk Edmund Diorio are to be commended for their attention to detail in documentation and preservation of the evidence before and during trial.

I

TESTIMONY OF MR. BERTIE PITTMAN

The State called as a witness Mr. Bertie Pittman, a boatswain's mate in the United States Coast Guard. The court found him to be qualified in the field of knot-tying and allowed testimony concerning the manner in which the knots on the bindings used to tie the victims were made. The court also allowed into evidence pieces of cloth seized from Ms. Joyce Graham's Rambler car on August 2, 1979, and permitted testimony as to the manner in which knots on one of these pieces had been tied.

The car had been seized on July 22, 1977, examined for blood July 25th, for fingerprints on July 26th, and completely inventoried on July 28th without these items being noticed. Trooper Witte, however, testified that he observed them on July 23, 1977, and found them in the same area on August 2nd. In addition to this testimony the jury had before it the testimony of Ms. Graham that she had used the cloth strip to tie her glove compartment.

In view of the conflicting testimony the court instructed the jury to disregard any testimony concerning the cloth unless it found Mr. Acquin tied it, that it was in the vehicle when seized and remained in substantially the same condition when admitted into evidence. The court rejects any claim of error, especially in view of the charge concerning this item to which there was no objection. See Appendix B.

J

EVIDENTIAL RULINGS

1. Fire at Home of Dr. Santoro

The defendant offered evidence that a fire, possibly intentionally set, occurred on August 11, 1977, at the home of Dr. Grace Santoro located on Rosewood Drive in Prospect. The claim for admissibility was that since arson could be inferred, and the victim of the fire was a Santoro relative, the same person who set the Beaudoin

fire set the fire at the Santoro home, while Mr. Acquin was in custody. It was represented to the court that Dr. Santoro was a sister of Jennifer Santoro's grandfather who had never seen Jennifer.

After a hearing in the jury's absence, the court sustained the State's objection on the grounds that the offer was remote and speculative. Tr. Vol. 38, A.M., p. 33. Evidence is admissible when it tends to establish a fact in issue, or to corroborate other direct evidence. *State v. Schaffer,* 168 Conn. 309, 317; *State v. Rose,* 168 Conn. 636. However, there is "no precise and universal test of relevancy and the question must be determined in each case according to the teachings of reason and judicial experience." *State v. Towles,* 155 Conn. 516, 523; *State v. Rose,* supra. Trials must be kept within reasonable bounds as to the time they occupy and the range they cover. *State v. Sebastian,* 81 Conn. 1, 4. For these reasons the court excluded the proffered testimony.

2. Statement of John Ricciuti

On October 10, 1979, the defendant attempted to introduce a written statement of Mr. John Ricciuti, the owner of The Red House Cafe, an establishment where Mr. Acquin had been on the evening of July 21, 1977. Tr. Vol. 41, pp. 15-25. In particular, counsel offered so much of the statement as provided, "the last time I observed Lorne Acquin was at approximately 1:00 A.M.—7-22-77 when he was leaving with the male that I described—While Acquin was in the establishment he appeared to be normal *not* drunk and causing no trouble." Exhibit 155 ID.

This statement, while signed, was not sworn to and was not a deposition which could have been admitted under the provisions of General Statute § 54-86 and Practice Rule § 789 et seq. Clearly, the statement was hearsay and, therefore, not admissible unless permitted under some exception to the rule. *General Motors Acceptance Corporation v. Capitol Garage, Inc.,* 154 Conn. 593, 597; *Izzo v. Crowley,* 157 Conn. 561, 563. Since there was no

evidence that the circumstances surrounding the statement provide any sanction for ascertaining its truth, it was not admissible. *DiMaggio v. Cannon,* 165 Conn. 19, 22.

IV
CLAIMED ERRORS IN CHARGE AND SUBMISSION OF CASE TO JURY

A.
REQUEST TO PROVIDE TRANSCRIPT AND JURY INSTRUCTIONS

The court denied written motions by the defendant that the court provide a "properly-edited trial transcript" (#153), and a copy of its instructions (#161). As to the first motion, it is noted that the transcript contains over five thousand pages and to have edited the objectionable portions, as well as evidence heard only by the court, would have been a time consuming task necessitating a lengthy delay. Likewise, Practice Book Rule, § 863 provides that if after retiring the jury requests a review of certain testimony, "the judicial authority . . . shall have the requested parts . . . read to the jury." No reason has been advanced to ignore this rule or to indicate that the jury was not satisfied with the reading of those portions of the evidence which it did request.

B.
CLAIMED ERRORS IN CHARGE

The evidence in this case concluded on October 11, 1979, at which time the court gave a copy of its proposed charge to counsel for the State and the defendant. Many of these instructions were incorporated by the defendant in his request for instructions (#160). The defendant registered four objections to the charge.

First, he objected to a portion of the charge which stated, "Now, although it is true that the burden of proving an accused is of sound mind is upon the State, it is also true that because most men are of sound mind absent evidence to the contrary, you may

infer from the facts, as you find them to be, that the defendant was of sound mind at the time of the incident upon which the charge is based unless some credible evidence tending to prove the contrary has been introduced."[5]

In so far as this exception is concerned, it appears that as counsel stated, "it [is] a small difference." Tr. Vol. 44, p. 72. In view of the fact that the court charged the jury that it might "infer" rather than "presume", there seems no just ground for objection. *State v. Harrison,* Conn. (41 Conn. L. J. No. 9, p. 3. Further, it has long been the law of this state that a jury is entitled to presume sanity, or as the court instructed in light of *Harrison,* to infer sanity, until the defendant offers substantial evidence tending to prove insanity. *State v. Rossier,* 175 Conn. 204, 209. (1978).

The second exception to the charge was the failure to include the second sentence of his request #49: "A jury is entitled to draw such inferences from a person's conduct as are reasonable inferences. But in a criminal case no inference can be drawn from conduct unless the conduct itself is proven beyond a reasonable doubt."

In view of the charge as read in its entirety, the court finds no merit to this exception. *Anderson & McPadden, Inc. v. Tunucci,* 167 Conn. 584, 590; *State v. Rathbun,* 74 Conn. 524, 527.

The third exception included the so-called Chip Smith charge, *State v. Smith,* 49 Conn. 376, 386, in its original charge. See Appendix C. Numerous appeals have raised an objection to this charge on the grounds that it is coercive and deprives a defendant of the free judgment of each juror. *State v. Peary,* Conn. (40

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5. The second element which the State must prove beyond a reasonable doubt is that at the time of the death of these individuals, the person causing the death or deaths was of sound mind, that is, legally sane. A person is of sound mind, legally sane and is responsible for his crimes and unlawful conduct, if at the time of such conduct he does not, as a result of mental disease or defect, lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Request to charge #24.

Conn. L. J. No. 13, p. 1, 6, and cases cited. The giving of a charge on the duty of jurors' obligation to listen to the comments of their respective jurors in the initial charge was sustained in 1925, see *State v. Schleifer,* 102 Conn. 708, and has recently been approved in *State v. Peary,* supra at 5.

The final exception by the defendant was the failure to include his request #53.[6] In view of the fact that there was no eyewitness testimony connecting Mr. Acquin to the scene of the crime, the court determined that this instruction would be inappropriate and, therefore, meaningless to the jury. "The charge to a jury must give it a clear understanding of the elements of the crime charged and the proper guidance to determine if those elements were present", *State v. Avila,* 166 Conn. 569, 574; *State v. Alterio,* 154 Conn. 23, 27; but a defendant is not entitled to a charge inconsistent with his claims of proof. *State v. DiBella,* 157 Conn. 330, 345. Since the defendant at all times denied his guilt, and there was no eyewitness testimony placing him at the scene of the crime when it is claimed to have occurred, the court finds no reason to justify the giving of the requested instruction.

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6. The vagaries of eyewitness identification are wellknown and you should receive with caution any identification testimony from any eyewitness and consider carefully whether that witness is really accurate in his or her belief. You should scrutinize with the greatest care any such eyewitness identification testimony before accepting it because the annals of criminal law are filled with instances of mistaken identification. As the late Supreme Court Justice Felix Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." [*United States v. Wade,* 388 U.S. 218, 228, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149 (1967) (Brennan, J.); *Macklin v. United States,* 409 F.2d 174, 178 (D.C. Cir. 1969); *United States v. Cognato,* No. N-75-153 (D. Conn. 1976; Newman, J.)].

For the reasons set forth, the motions for judgment of acquital and motion for new trial are denied.

PICKETT

_____, J.

APPENDIX A

THE COURT: Ladies and gentlemen, the purpose of my conferring with counsel at the bench, the court has certain matters that will not require your attention.

As I have indicated to you many, many times, it's of extreme importance, especially in view of the length of time that we have been proceeding with this case, that you do not read anything about it, discuss it with anyone, allow anyone to discuss it with you.

You will recall that you were given an oath, that you would without respect of person or favor of any man, well and truly try, and true deliverance make, between the State of Connecticut and the defendant, who you shall have in charge, according to law and the evidence before you; our own counsel and your fellows, you will duly observe and keep; and you will speak nothing to anyone of the business or matters you have in hand, but among yourselves, nor will you suffer anyone to speak to you about the same, but in court.

Of course, as I have instructed you, ladies and gentlemen, that means until you have heard all of the evidence that is found to be admissible through oral testimony and any exhibits.

The purpose of my remarks to you at this time is for your convenience. I anticipate that the court will be engaged, not only today, but probably tomorrow on hearing these matters. I would prefer not to have you report back and have you sitting in the jury room to remind you of what I have already just reminded you. From my observation, you appear to be an intelligent and dedicated group of citizens. And, I trust that you will be able to follow these instructions.

And, so, I ask you upon the oath which I have just reminded each of you: is there anyone that has any question, any question whatsoever, that you will not be able to follow that oath, that instruction and not read anything about the case or discuss it with anyone?

Of course, if evidence comes in at a later time, you will hear it. If it is not, as I have instructed you, it is no cause for you to be concerned with what evidence the court may have heard outside your presence.

So, I would prefer not to have you report back tomorrow because the court will be engaged. But, I ask you: does anyone have any question in his or her mind whether or not that you will be able to return, probably, Thursday morning without being tainted or read anything about it or discuss it with anyone for any reason? This is for your convenience, ladies and gentlemen. I would prefer not to bring you back and have you sitting in the jury room. It is for your convenience, but obviously this has to work both ways. I want to cooperate with you, but obviously you have to cooperate with the court. Does anyone have any reservation whatsoever?

I will take it, ladies and gentlemen, that you will remain as impartial as you are at the present time and you will not consider anything about the guilt or innocence of your ultimate verdict of this case until you have heard all of the evidence, at the conclusion of the case, the argument of counsel and the charge of the court.

I am asking you, however, to contact the clerk's office tomorrow afternoon, sometime after three-thirty, because it may be that your presence will not be required on Thursday either. You are not sitting on Friday. Therefore, it would mean you would not return here until next Tuesday, the 4th. So, you will have—could be as long a time as a week for you to remember to keep yourself fair and impartial as you are at the present time.

I hope I am not taking an undue risk, ladies and gentlemen, but I am sure that I can trust you and that you will follow the court's instruction.

You may be excused now until Thursday morning with the request that you do contact the clerk's office. If it's not necessary for you to come in on Thursday, then you will report back next Tuesday, the 4th, at ten o'clock. You may be excused at this time. Transcript, Vol. 21, pp. 61-65, Aug. 28, 1979.

APPENDIX B

Ladies and gentlemen, you will recall that physical evidence consisting of certain pieces of cloths, looks like 6-Ps, taken from a 1965 black Rambler automobile on August 2nd, 1977, owned by Joyce Graham, was offered in evidence. You will recall that the vehicle was taken into police custody on July 22nd, 1977, examined for blood on July 25th, 1977, examined for fingerprints on July 26, 1977, and an inventory was made on July 28th, 1977. It will be for you to determine whether these pieces of cloth were in the vehicle at the time it came into police custody and whether they remained in the same general condition when admitted into evidence. If you find to the contrary, then this evidence shall have no weight in your deliberations and you will draw no inference from their admission. In this connection you will also bear in mind the testimony of Ms. Graham who testified that these items were hers and tied by her to secure the glove compartment on her car. If you find that they were in the vehicle on July 22nd, 1977, and remained in the same condition and were tied by Mr. Acquin, then you may consider them in the light of the testimony of Mr. Bertie Pittman and Mr. Graham Hall, witnesses offered by the State and the defendant, as individuals with particular knowledge or expertise in the field of knot tying. You may give such weight and draw such inference to this material as you find warranted based upon your assessment of the qualifications of the witnesses testifying for the State and the defendant. Charge to Jury, Transcript Vol. 44, pp. 14-16, October 17, 1979.

APPENDIX C

Finally, ladies and gentlemen, I will conclude with this instruction: a verdict in a criminal case must be unanimous, one with which all of you agree. Usually, there are some differences of opinion by jurors when they first retire. As reasonable people, they discuss these differences and try to reconcile. If a jury cannot come to an agreement upon a verdict, the case usually must be tried again before a different jury. A second trial imposes a severe hardship upon the parties involved, the State and the accused. You must, therefore, make every reasonable effort to come to a verdict. You must listen to what other jurors say. You must not hesitate to reconsider your own opinion. If few of the other jurors do share your viewpoint, you should carefully examine its soundness. All of you have heard the same evidence, the same explanation of the law. As reasonable people, you should ultimately be able to come to some agreement upon a verdict. On the other hand, the verdict must be one which each juror considers just in his own mind. A juror cannot desert his firm and honest convictions simply in order to reach an agreement which he regards as wrong. Transcript, Vol. 44, pp. 68-69, October 17, 1979.